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Personal Property — Banks

including Contracts of Agency, Sale and Warranty; the Law on the Carrying of Merchandise and Passengers; Negotiable Paper; Guarantyship; Suretyship; Partnership; Shipping, Marine and Fire Insurance

By

ALBERT S. BOLLES, Ph.D., LL.D.

Lecturer on Commercial Law and Banking in Haverford College; formerly Professor of Mercantile Law and Banking in the University of Pennsylvania

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CHAPTER VIII (*Continued*)

MODES OF ENTIRE OWNERSHIP (*Cont.*)

§ 3. By Particular Contracts

SUBDIVISION 1. CONTRACT OF AGENCY

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42. A person cannot hold an agent liable if he permitted him to act while he exceeded his authority.

1. Having described the general principles relating to contracts, the way is prepared for describing the principles that apply to persons in special relations, and the first of these is the relation of principal and agent. One of the peculiarities of modern business is the transaction of so much in a representative manner.

2. We may begin our inquiry by asking, what persons are competent to act as agents? This question is important for the reason that a person who is disqualified from making a contract on his own account can sometimes act for another. Thus, a person, under age, or a married woman, or an alien, may act as an agent, even though he or she is incapable of acting in any other manner.

3. Agents are of two kinds — general and special.

A general agent is authorised to represent his principal in all of his business, or in all of a particular kind; a special agent is authorised to do only a specific thing, or a few specific things.

4. Authority may be given to agents in several ways. One of the ordinary modes is by writing, often under seal, called a power of attorney or procuration. In many cases an agent acts only by oral authority. An agent may be thus appointed, possessing authority to make a written contract, but he cannot execute one under seal. To make a sealed contract he must be authorised by an instrument containing similar authority.[1]

5. Whoever deals with a person repeatedly employed to do specific things, for example, to sign bills, receipts, policies, or to make purchases, is justified in believing him to be authorised to do these acts with the consent and approval of his employer. But an agent who is usually employed to buy, though always for cash, possesses no implied authority to buy on credit. On one occasion a note was signed by the son of a member of a firm. He was at that time their bookkeeper and manager. It was not customary for clerks to give notes, though he had done so in some cases. The court remarked that a single act by a servant, without disapproval, has justified a person concerned therein in trusting him afterward. A principal is bound by the act of an agent no further than he is authorised to bind him, but the extent of an agent's power is ascertained from facts as well as words.

[1] See Vol. I., § 20, p. 58.

The law often is that he who trusts must pay. In the case under consideration the clerk was an authorised agent for many purposes. Whether he had authority to make the note or not was a question of fact for the jury, and was decided by them affirmatively.

6. An agent's acts may become valid by the principal's adopting and ratifying them; and a corporation, like an individual, can bind itself by ratifying the acts of its agent. The ratifying of a contract necessarily implies the relation of principal and agent; and, in so doing, his authority relates back to the beginning of his exercise of it. No ratification is effective to bind a principal unless in the clear light of all the material facts, for the law does not presume that he will ratify the conduct of his agent in the dark. Generally, one who receives and holds the beneficial result of the act of another performed as his agent is not permitted to deny such agency.

Thus, should an agent sell under seal the property of a supposed principal, and receive payment and hand this over to him, he might avoid the sale and recover the property if he could show that the agent had no authority to sell it; but such principal could not do this and also hold the money. In other words, he cannot deny the acts of his agents and still retain the fruits of the transaction. Again, a principal who knows that another is acting as his agent, and does not disavow the pretender's authority as soon as he can, and permits a person to deal with him, is regarded as adopting or confirming his agent's acts. Nor can a supposed principal adopt a part of his agent's act and

reject the rest. He must adopt the whole or none. Lastly, should an agent's conduct in selling his principal's property be ratified, so also would be his representations concerning the sale.

7. An unknown principal may show that one of the contracting parties was actually his agent. He may thus make himself a party to the contract, but, if the other contracting party has acted in good faith with the supposed agent, or paid him anything in cash or otherwise, he will not be the loser by the principal's conduct. In other words, so long as a principal remains unknown, he cannot make a party contracting with his supposed agent suffer by reason of his own silence or concealment. This would be contrary to reason. There are many cases of this kind in which a principal, for some reason or other, prefers not to be known in the transaction, and another person is employed to act for him. A principal who chooses to act in this manner may do so, but surely the other contracting party ought not to suffer through the principal's mode of doing business. Again, an undisclosed principal, after his discovery, may be liable on his contract. Lastly, one who sells to an agent knowing that he is thus acting, and chooses to charge the goods to him alone, cannot afterward transfer the charge to the principal.

8. There are many kinds of agents. Among the most widely known are factors and brokers, between whom there is a well-defined difference. A factor is a mercantile agent who sells and purchases and has possession of the goods; a broker is an agent of similar

character not having possession of them. Consequently, a factor may act for his principal and yet in his own name, because the actual owner gives to him the appearance of an owner by delivering to him the goods, while a broker can act only in his principal's name. A purchaser of goods from a factor may set off against the price a debt due from him, unless he knows that they belong to another. But one who purchases goods from a broker cannot do this. Furthermore, a factor has a lien or claim on goods for the indebtedness of his principal to him, while a broker generally has not.

9. A cashier is another illustration of a general agent possessing all the authority necessary or usual for the transaction of his business. He cannot, however, bind his employer by an unusual or illegal contract. In one of the cases the court declared that a cashier was allowed to present himself to the public as habitually accustomed to pay bills or notes of his bank, also to pay notes discounted by the directors, to receive payment of debts due to the bank, to receive money on deposit, and to pay the same to order of depositors. He is regarded as having possession of its books, notes, and other property, and as keeping its accounts and other records. In many banks these duties are performed in part by tellers, clerks, or assistants, but he might at any time perform them if he desired. As he is a general agent, so he can bind his bank while acting within the scope of his authority, though violating his instructions.

10. The same description, with some qualifications,

applies to the agents of other companies or corporations. Their acts bind their employers or companies so far as they have authorised them, or have justified persons who deal with them in believing that they possess the authority exercised by them, or are acting within the general scope of their authority.

11. The authority of a general agent to contract is limited to the usual manner of accomplishing the business entrusted to him. Persons who deal with an agent carrying on a general business are not bound to inquire into the particulars of his authority. A person entrusted with the general management of a trade or business has an implied general authority from his employer to make such contracts as are usual and necessary in the ordinary conduct and management of the business. A foreman, for example, in a sawmill who took an order for a large quantity of lumber, and agreed to have it ready for delivery within a particular period, bound his principal thereby, though no particular authority from him was shown authorising the agent to make the contract.

12. Furthermore, a general power implies whatever may be necessary for its complete execution. For example, a general sales-agent is competent to rescind a contract of sale with the consent of the other party. One who is employed by another to act for him in the usual business or trade of an agent, as auctioneer, broker, or the like, thereby acquires authority to do all that is necessary or usual in that business. Again, a person who puts his goods into the possession of another whose ordinary and usual business is to sell

goods authorises the whole world to believe that the possessor has them for sale, and any buyer could hold them.

13. On the other hand, an agent who is authorised to do a specific thing, and exceeds his authority, does not bind his principal, because the party dealing with him must inquire for himself into the extent of his authority. The distinction, therefore, between the authority of a special and a general agent is very important. In the one case the principal is bound by all acts of the agent within the natural and usual scope of the business; in the other a person who is doing business with an agent must examine into his authority and cannot hold his principal for any acts that exceed it. Of course, secret limitations are not binding on persons who are not acquainted with them.

Some illustrations may be given. An attorney who is authorised to convey a tract of land for his principal after purchasing the same cannot agree to convey it in advance of his purchase, and should he do so could not properly execute his authority, and the purchaser would acquire no title. Again, an agent who is specially employed to receive payment in money cannot vary his authority by receiving a note.

14. Generally, an authority must be exercised with great strictness, otherwise the principal will not be bound, although his agent may be. When an agent's authority is in writing the instrument itself may be considered in order to ascertain the intention of the parties and the extent of the agent's authority.

15. A power to two cannot be executed by one of

them. An exception to this rule exists in the case of a joint power exercised by public agencies. Thus, either of two factors, whether joint factors or not, may sell goods consigned to both; and when they are joint agents, whether partners or not, notice to one is notice to both.

16. In commercial matters usage may add to an agent's authority whatever may be required for the discharge of his duty in the most complete manner. Thus, an agent having authority to discount a bill may endorse it in the name of his principal, unless he is expressly forbidden to endorse it. A broker who is employed to procure insurance may adjust a loss.

17. Authority to sell includes authority to warrant whenever the usage or custom of making sales with a warranty exists; also when the want of authority to warrant is unknown to the purchaser without his fault. For example, an authority to sell a horse implies an authority to warrant the animal, because horses are usually sold in this manner. A general authority to transact business, or even to receive and pay debts, does not authorise an agent to accept or endorse bills or notes that will involve his principal. Indeed, authority to endorse is construed strictly, but such authority may be implied from the previous usage of an agent known and sanctioned by his principal. Thus, a confidential clerk was accustomed to draw bills for his employer, who authorised him on one occasion to endorse, and on two other occasions to receive money by endorsing his employer's name.

The court declared that a jury might regard the clerk as authorised generally to endorse for his employer. This is an extension on very slight evidence of a clerk's authority.

18. An authority to sell implies an authority to sell on credit, if this be usual; otherwise, it does not. Consequently, should an agent sell on credit without authority from his principal, the latter may claim his goods from the purchaser, or regard the agent as responsible for the amount. An auctioneer or broker has no right to sell on credit unless authority is given to him expressly, or by usage. Furthermore, an agent is generally responsible who mixes the goods of his principal with his own in such a manner as to confuse them. He is also responsible whenever he takes a note payable to himself, unless this is authorised by the usage of trade. Should he take a note thus payable to himself and become bankrupt, it would belong to his principal.

19. Authority to sell on credit does not authorise an agent to collect money in the name of his principal. A purchaser, therefore, who should pay him would not be protected and discharged simply by proving the agent's authority to make sales. But an agent to whom merchandise has been entrusted, with authority to sell and deliver, is authorised to receive money from purchasers. Otherwise the fraud on them, so the courts have remarked, would run into criminality.

20. A general authority to sell confers authority to sell by sample.

21. The payment of money to an agent binds his principal only when it is paid in the regular course of business. And payment to a subagent whose appointment was not authorised by the principal, renders the agent liable to his principal for the amount. Thus, a legacy left to a tradesman which was paid by the executors of the donor to one of the tradesman's clerks, who received payments daily, was not a sufficient payment to discharge the executors. A general agent who is authorised to receive money at a counter, or any person who is authorised to receive it at any particular place and in a particular way, has no authority for receiving it in any other place or way. Nor would a principal be bound by an agent, who, having authority to receive money, should discharge a debt without receiving it and give a receipt therefor.

22. An agent having authority only to collect a debt has no right to take a note for the amount from the debtor to himself, and thus substitute himself as creditor. But the ratifying of such an arrangement by the principal would bind him, and the debtor would be released from liability to the principal on the original claim. An agent employed to receive payment in money cannot vary his authority by receiving a bill. And, surely, an agent cannot, without particular authority, commute a payment by receiving anything — a horse, for example — in discharge of a debt.

23. Again, an agent having authority to settle a claim against a carrier for the loss of goods cannot give a discharge without receiving a consideration. A mere

agreement to receive other goods in the place of those lost would not release the carrier from liability. In a case in which this principle was decided the court remarked that a letter of attorney authorising an agent to collect a debt would not empower him to give a discharge on the receipt of the debtor's note. Still less would a clerk be authorised to release a liability for a claim without receiving any consideration whatever.

24. Nor can an agent entrusted with goods sell them without authority; should he do so the principal could affirm the sale and sue the buyer for the price, or disaffirm the sale and recover the goods from the buyer.

25. An agent who is employed to sell property cannot buy it himself unless he is expressly authorised to do so; nor can a trustee purchase property held in trust for another. But, of course, a principal may ratify and confirm a sale or purchase by his agent by accepting the proceeds and delaying to make the objection after the wrongful act is made known to him. Again, should a trustee or agent sell property, and buy it, not in his own name, but in the name of someone else the sale would be void.

26. An agent cannot appoint a subagent unless he is authorised to do so expressly, or by usage, or by the obvious reason and necessity of the case. Thus, a consignee or factor for the sale of merchandise may employ a broker to sell when this is the usual course of business. A subagent appointed without such authority is only the agent's agent, and not the principal's. The principal, however, may authorise or

confirm or ratify the subagent's act, and, when he does, the act becomes his own.

When a note or other obligation is sent to a bank for collection, which it sends to another bank nearer to the place where the debtor lives, is the first bank or immediate agent, or the second bank or subagent, responsible to the owner for any neglect pertaining to its collecting by the second bank? Two rules have contended for recognition. In most of the states a bank that exercises proper diligence and intelligence in selecting a collecting agent to do whatever may be necessary in relation to the collection, is not liable for his conduct. In New York, and a smaller number of states, a bank to which paper is sent for collection is responsible for the negligence of a subagent to which it may be sent. A similar rule has been established by the Supreme Court of the United States.

27. A principal, unless his agent is personally interested in the business, may at any time revoke his authority. His death operates in this manner. But an agent's death does not revoke the authority of a subagent appointed by the agent under an authority given him by the principal. Furthermore, the authority of an agent who has an interest — for example, a person who has authority to sell goods and apply the money to his own benefit — cannot be revoked by the principal, wherever the execution of the agent's authority is needful to make his interest valuable.

28. A general authority may continue to bind a

principal after it has been revoked, when the agency was known, and the revocation was wholly unknown, to the party dealing with him without such party's fault.

29. As a principal may revoke his agency, so may an agent withdraw at pleasure; there is a limitation on both sides; neither can exercise this power in an unfair, injurious manner that circumstances will not justify. Damages, therefore, may be recovered, should an agency cease in a way that injures the other party.

30. An agent is bound in his principal's affairs to use all the care and skill that a reasonable man would use in his own. He must also act in good faith. He cannot make a profit from his principal for whom he has undertaken to act. But an agent who acts gratuitously, without legal right to compensation for his services, will be responsible for no other negligence than that of a gross character. The varying degrees of negligence have often been the subject of judicial controversy, and it is by no means easy to distinguish between them. The shades are almost imperceptible, and no guide besides the general principle can be furnished to determine the legality of the acts of an agent in any particular case. It must be left for the consideration of a jury to determine whether the negligence is of a kind, or not, for which he is responsible.

31. An agent should keep an exact account of his doings, especially of his pecuniary transactions. After a reasonable time has elapsed a court will presume that his account has been rendered, accepted, and

settled. Otherwise every agent might remain liable on his account. Again, he is liable not only for the balance in his hands, but for any interest that has accrued.

32. An agent represents his principal in receiving information affecting his business. Therefore knowledge acquired by an agent in the course of his business is regarded as the knowledge of his principal. It is supposed that he will inform his principal of everything that will be useful to him; if he does not, nevertheless his principal is regarded as having gained the information from him, because he is acting as his principal's servant, and the law assumes he is doing his duty. At all events, if he is not, of two innocent persons who must suffer, his principal, who has appointed him, must be the loser through any failure of the agent in duty.

33. The law concerning notice or information given to an agent has a very wide application. Notice to an officer or member of a corporation is regarded as notice to the corporation whenever, either by appointment or usage, he had authority to receive it. Not in all cases, though, is notice to a member of a corporation notice to the corporation itself. Many cases have occurred in which the question has arisen whether or not an officer held such a relation to a corporation that information to him should be regarded as a notice to the corporation of which he was an officer or employee. Thus, information to the cashier of a bank concerning the protest of a note, for example, would unquestionably be considered

notice to the institution; but such information conveyed to a director would not be considered notice to the institution, for the reason that it is not within his province or duty to attend to such matters. Many questions of this kind concerning notice arise in business. The tendency of the law is not to widen the province or duty of officers to convey information to the institutions with which they are connected, and the reason is very sound — their duties might become too burdensome.

There is a pretty clear line between advisory officers and those whose duties are of an active character. The general officers of an institution, those who are employed in its actual management, are clearly held accountable for all information touching the business of the institution they represent, and information conveyed to them is regarded, and properly so, as information conveyed to the institution itself.

34. An invasion of this rule occurs whenever the agent's interest is opposed to that of his principal; the law assuming that the agent will then be silent. This rule is frequently applied, especially in transactions wherein the agent is deeply concerned in perpetrating a fraud.

Thus, a depositor receives his bank-book, and his checks and other vouchers, from the bank. The depositor looks them over on their return from the bank, and supposes they are correct. In ordinary cases such action on the part of a depositor would prevent him from making reclamation upon the bank on the discovery of his secretary's fraud or mistake,

should he neglect to do so after a reasonable period. Should it appear, however, that his secretary has committed a fraud on him by forging checks and, on the return of the book, has stolen some of them or so changed them as to make an examination by the depositor fruitless, then in some states he would not be precluded from recovering against the bank on the discovery of the truth, for the simple reason that the conduct of his agent would not be binding on himself. But in other states it has been held that a depositor should examine his pass-book himself, and if instead of doing so, he delegates the duty to another, he is responsible for the consequences.

Again, an agent who represents two principals and concocts a scheme against one of them is presumed to have made no disclosure of his intention to the other principal. An independent fraud committed by an agent on his own account is beyond the scope of his employment and is analogous to a fraud wilfully committed by the servant for his own purposes, and not as a means of performing the business entrusted to him by his master.

The treasurer of a corporation was also vice-president of a bank and its general manager. As treasurer of the corporation he made two promissory notes which were discounted by the bank and credited to the corporation. On the same day, as treasurer, he drew a check and charged the amount to the corporation on the books of the bank. With the proceeds of the check he purchased two drafts of the bank drawn by him on its New York correspondents, signing them

as vice-president of the bank and drawing them to his own order. He received payment of the drafts in currency, and used the proceeds for his own private purposes. Subsequently, the bank sued the corporation on his promissory notes and recovered, the court holding that, in thus acting as treasurer, he kept within his authority, and the corporation was liable for the loss.

35. Passing from the effect on a principal of notice conveyed to him through his agent, we may inquire into the effect, on him, of a fraudulent representation made by his agent in conducting his business. Though he may be personally ignorant and innocent of the wrong, he is liable and cannot retain any benefit from his agent's representations. And whenever he does retain the benefit he cannot disavow the representations, and shield himself behind the plea that the person was not acting for him. By retaining the fruit of his agent's act he becomes responsible for the act itself.

A principal is also liable for a material representation made by his agent which he believes is true, but which the principal knows is false and does not correct. A sale made under such circumstances may be avoided by the buyer.

36. Though a principal may be responsible for the deliberate fraud of his agent in executing his employment, he is not responsible for his criminal acts, unless he expressly commanded them. But there are occasions on which he has entrusted property to his agent who has used it illegally, yet rendered his prin-

cipal liable criminally without proof of direct participation in the act; for example, in smuggling goods.

37. Once it was considered that an agent of a corporation who did a criminal thing was, indeed, responsible therefor, but not the corporation itself, because it was not capable of doing an immoral thing. Its nature was peculiar; it was not endowed with a moral quality. But the law has long since seen the necessity of regarding a corporation in a different light, and the wrongful acts of its officers are often visited on the institution itself. For example, an officer of a bank has no right to lend more money to a customer than the law prescribes, or to take security that is forbidden; nevertheless, if a bank receives the benefit of his act, it is punishable therefor, and the good of society requires that this should be done. Consequently, for all the acts of this character that are done with the intention of benefiting the institution, although they are not within the legal scope of an officer's authority, the institution itself is responsible.

Every agent is entitled to indemnity from his principal when he acts in obedience to lawful orders, or when he does an act that is not wrong in itself, which he was induced by his principal to regard at that time as right.

38. An agent cannot disregard the instructions of his principal without making himself liable to him for the consequence. In ascertaining or defining the extent of his instructions, custom or usage often has great influence, because, on the one hand, an agent is entitled

to all the advantages usage gives him, and, on the other, a principal has a right to expect that his agent will conduct himself in harmony with the usages of his business. But usage never prevails over express instructions. A principal who accepts the benefit of an act performed by his agent beyond his instructions relieves his agent from responsibility therefor.

39. Again, goods purchased through fraud and in the principal's name, as a means for deceiving creditors, may be taken and sold for the agent's debts. But the principal, by affirming his agent's acts, may make the goods his own despite his agent. And he may repudiate the purchase of goods bought without his authority, and yet hold them as security for the money advanced or paid by his agent.

40. Generally, an agent may make himself liable by his agreement, or by going beyond his authority, or by going differently, or by concealing his character as an agent, or by his own bad faith. If an agent should execute an instrument that would hold him personally, he cannot clear himself by showing that, in fact, he signed it as agent, which was known to the other party. The reason is, this would vary the terms of a written contract by oral evidence, which the law will not permit to be done except in cases of fraud, accident, or mistake. To permit this generally would destroy the certainty of written contracts.

41. The principal of an agent who embezzles, or wrongfully takes his employer's goods, may recover or reclaim them if they can be traced and identified. If they become blended with the agent's own goods and

he should die or become insolvent, his principal could claim only as a common creditor.

42. An agent who exceeds or disregards his authority, and this is known by a person dealing with him, cannot be held personally liable; if not known, the agent is liable on the whole contract, although he may have authority to execute or perform only a part of it. A person who has no authority, and acts as agent, is personally responsible. But an agent who should exceed his authority ignorantly would not be personally liable except to an innocent party dealing with him, who would otherwise suffer loss.

SUBDIVISION 2. CONTRACT OF SALE

1. Only the owner of goods can sell them.
2. Illustration of this principle.
3. Negotiable paper is an exception.
4. To make a sale there must be an agreement by competent parties.
5. Delivery is not essential to constitute a sale.
6. But the thing sold must be identified.
7. The difference between a sale and an agreement for a future sale.
8. An illustration of the principle.
9. A contract for a future sale does not become a sale at the time for its performance.
10. There can be no sale of non-existing goods.
11. The ownership of things is not changed by unperformed conditions.

12. The law presumes that payment and delivery are to follow a sale; if they do not either party may regard the contract as ended.
13. Or, as alive, and either party may enforce it.
14. What the seller can do when the buyer refuses to take the goods.
15. The rule concerning goods sold at public auction.
16. The sale of copyrighted goods.
17. What is a sufficient delivery.
18. What must be done when an actual delivery cannot be made.
19. Delivery of timber.
20. Delivery of portable articles.
21. Sale and delivery of things at sea.
22. A delivery of a fixed quantity is not completed by a tender of a bill of lading for a larger quantity.
23. When delivery is a fraud to prevent creditors from taking the goods, and what rights are acquired by an innocent purchaser.
24. Until delivery, what care the seller must take of them.
25. When their delivery is complete in a store they are kept at the buyer's risk.
26. They must be sent as the buyer directs.
27. The seller has a right to retain them until the price is paid.
28. When the seller loses his lien he cannot recover the goods.
29. But he can stop them during transit if the buyer becomes insolvent.

30. What the buyer must do when goods are defective in quantity, quality, etc.
31. Effect of a clause in a contract providing for mistakes in quality, etc.
32. What the buyer must do when only some of many things are delivered.
33. The same subject.
34. Effect of the denial of the existence of a contract of sale after it has been partly performed.
35. An illegal contract of sale cannot be performed.
36. Effect of fraud in making sales.
37. A buyer may cancel a contract when fraud has been practised on him.
38. And a defrauded seller may sue for the loss he has sustained.
39. What is a waiver of a right to cancel it.

1. A person cannot sell a thing he does not own. If he has merely the right of possession to goods, has hired them, or has possession only, as in the case of stolen or found goods, he cannot sell them and give a good title against the owner. And if he pretends so to do the owner can recover them from the purchaser, though he was wholly ignorant of the seller's defective title at the time of purchasing. In other words, only a person who has a right to merchandise can sell it, because the sale must transfer the right of ownership from the seller to the buyer.

2. Thus, a contract was made with a farmer for the use of a yoke of cattle for one year; at the end of that period they were to be returned. The hirer also

had the privilege to pay a price named and keep them. As the cattle were sold during the year by the keeper or bailee without paying the price, the sale did not pass the title, and the owner could reclaim them.

3. Negotiable paper is an exception to this rule. Whenever this is transferable by delivery a purchaser in good faith acquires a title thereto, even though he has bought it of a thief, or of a finder. But the owner only of all other things can legally part with them, and a thief or finder who should attempt to give a good title would fail, and the true owner could recover them. An owner, however, who sells a thing, although he was deceived and induced to do so through fraud, cannot reclaim it from another who, in good faith, bought it from the defrauder.

4. Assuming that the possessor of goods is their owner, and competent to sell them, what must he do to accomplish this purpose? He must agree with another competent party for the transfer of their ownership from himself to the buyer for a fixed price. If the ownership be transferred the goods are sold; if the ownership be not transferred they are not sold.[1] The completion of the sale does not depend on their delivery by the seller, or on the payment of the price by the buyer, but on a change of ownership. By the mutual assent of the parties the buyer immediately acquires the ownership and all the rights and liabilities of ownership, so that, should any loss or depreciation

[1] "If the vendor agrees with the vendee to transfer the absolute property in the thing to the vendee for a money price, the contract is complete and binding on the parties. The vendee becomes entitled to the specific chattel, and the vendor has a right to the price agreed upon." 55 Mo. App., 369.

of the articles purchased occur, the buyer would be the sufferer. On the other hand, he would be the gainer by any increase in their value.

5. The parties may expressly agree to the giving of a credit that will bind the seller, or this may be inferred, or implied, from usage or from circumstances. The delivery and acceptance of goods, or the payment of money for them, or a receipt from a seller of what is known as earnest money, are acts from which courts are justified in inferring that a sale has been effected. But neither delivery, nor earnest money, nor part payment, is essential to the completion of a contract of sale. This is the common law, which has been somewhat changed by the statute of frauds, as we have already learned.

6. When a sale relates to an entire thing no question can arise concerning its identity. But when it forms part of a general mass a sale is not complete, and no ownership is transferred, until the thing sold is separated, ascertained, or identified. Thus, D bought of H 300 barrels of oil that were to be delivered "on first water," and paid the purchase money for it. He pointed to a large quantity of oil, and requested D to select the quantity he had purchased. He went away without selecting or separating the quantity purchased. A flood afterward swept away all of H's oil, and D afterward demanded delivery of the 300 barrels he had purchased, which H refused to deliver. It was decided that the sale had not been completed, and consequently that no title to the oil had passed to D.

7. The difference between a sale and an agreement

for a future sale may now be considered. Every sale is a complete or executed contract, although there may be no payment or delivery of the thing purchased. But the contract itself is complete; nothing remains unfinished. An agreement for a future sale is a contract to sell, which is to be executed or carried out at a future time, and is called an executory contract, in distinction from a sale, which is an executed or completed contract. A sale is completed by a transfer of the ownership of specific goods or other things; *to complete* an agreement for a future sale, the thing forming the subject of the contract must always be *delivered* and, in some cases, though not always, accepted.

8. An illustration of an executory contract, or agreement for a sale, may be given. A contracted to sell to B a quantity of leather that was then in vats in the process of tanning. The hides could have been removed at the time of making the contract. They were to be delivered, however, about three months afterward. It was decided that no immediate ownership in them passed to the buyer, and that the leather belonged to the seller, and could be taken by his creditors. This was declared to be so notwithstanding the fact that it had long been the course of business for curriers to purchase leather of tanners while it was in the process of manufacture, which was to be delivered when the tanning was completed, and that advances were frequently made on such purchases. Justice Gibson declared that an agreement for a subsequent delivery was essentially executory. The property in an article

made to order passes only by its delivery, because, at the time of ordering it, there is no property in anything to pass; the accidental existence of a part of the thing at the time does not give the customer a specific right to the whole.

9. A contract for the future sale of a thing does not, on the arrival of the time for executing it, or happening of the event mentioned, become a sale, transferring ownership. The buyer does not then acquire it, and cannot, by tendering the price, acquire a right to the possession; he may tender the price, or do whatever his obligation requires, and then sue the owner for not observing his contract and delivering the machine or other thing, but the ownership of the article is still that of the original owner.

10. For the same reason that the subject of a sale must be in existence, the ownership of goods that have no existence at the time of their sale cannot be transferred. Thus, in contracts for a sale of articles that are to be manufactured, as the subject of the contract is not in existence when the parties made their agreement, no ownership passes until the thing to be manufactured is completed, and has been delivered and accepted by the person giving the order.

11. One's ownership of a thing is not changed by a sale and delivery on conditions that are to be performed afterward but which are not; but is changed when the delivery is absolute and the bargain is perfect, or can be made so by reference to something else. For example, it is certain enough when the price can be obtained by mere computation. Therefore, a sale of

a large raft for so much per thousand feet and delivered to the buyer, changed the property, though the computation was not made.

12. The law presumes that a sale is to be followed immediately by payment and delivery, unless the parties shall otherwise agree. In other words, the law supposes that the seller intended at once to deliver, and the buyer, in like manner, to pay for the goods purchased. If, therefore, the buyer departs without paying or tendering the price, the seller may consider that there has been no sale; and, consequently, should the buyer come at a later period, and offer the price and demand the goods, the seller could refuse to part with them. Or, if the person to whom the offer of sale is made accepts the offer, but still refuses or neglects to pay the price, and there are no circumstances indicating a credit or justifying the refusal or neglect to pay, the seller may disregard the acceptance of his offer. It would, however, be a proper thing for the seller to demand payment of the price before he treated the sale as void, and a refusal to pay for the thing sold would then give him at once a right to regard the goods as his own. Should the seller unreasonably neglect or refuse to deliver the goods sold the buyer would thereby be justified in supposing that no sale had been made, or that it had been anulled or avoided.

13. Neither party is required to act thus in consequence of the refusal or neglect of the other. As a sale actually has been made, the seller may sue the buyer for the non-payment of the money due to him, or the buyer may sue for the non-delivery of the mer-

chandise. Either party has an election of this nature that he can exercise. He may consider that the contract is ended by the neglect of the other party to do what is required of him, or he may regard the contract as alive, and seek to enforce it.

14. Should the buyer neglect or refuse to take the goods and pay the price within a reasonable time, the seller can resell them, and give notice to the buyer that he looks to him for the deficiency, if there be any, from the failure on his part to take the goods and pay for them. In making such a resale the seller acts as agent or trustee for the buyer, and his proceedings will be governed by the rules that relate to persons acting in such a capacity. One of these is that he must use due care and diligence, and act in perfect good faith. And again, the receipt of money after the time for delivery, on account of the contract, will not prevent the seller from recovering for the loss he has sustained. In a case involving this principle the court remarked that a resale was the usual mode of ascertaining the difference between the contract price and the value of the article when the buyer refused to accept it. But it is not the only mode. The law has no single mode for settling the value of an article in the market at a given time.

15. The owner of goods sold on credit at public auction, but which the buyer refuses to take, can maintain an action in his own name against the buyer, before the credit has expired, for not observing his contract. The damages or sum that may be recovered is the difference between the price that was to be paid

and their value at the time of the buyer's refusal to take them. This may be ascertained by a resale at the buyer's risk, but some other mode of estimating the value of the loss may be adopted.

16. Important questions sometimes arise concerning the restrictions on sales of goods that are resold. How far are the restrictions binding on the secondary purchasers, especially when they know nothing about them? This question arises the most frequently after the sale of copyrighted goods, the secondary purchaser seeking to escape from the restrictions that bound the seller. It has been decided that a stipulation, in a contract for the sale of a proprietary medicine sold under a registered trade-mark, that the purchaser shall not sell it for less than a specified price, does not follow the medicine into the hands of a subsequent vendee, and he cannot, therefore, be prevented by the manufacturer from selling at less than the stipulated price, although he knows that the manufacturer sells only at that figure.

This rule is founded on the principle that a restriction on the right of the owner of personal property to sell or use it does not run into the hands of a purchaser from him, whether he knew of the restriction or not. In other words, a covenant concerning personal property binds only the maker and his personal representatives, and does not run with the property like covenants relating to land.

One who purchases a copyrighted article, therefore, from the absolute owner may sell or use it exactly as he pleases so far as the copyright law is concerned,

notwithstanding any restriction attempted to be imposed on the vendee; but if he purchases from one who is a mere agent for the sale of the article, the restriction is binding on him. But if an agent has agreed to sell under certain instructions, which are unknown to his customers, they are not bound by them; the wrong is that of the agent who alone is responsible.[1]

Again, should the owner of a copyright transfer the title covered by the copyright to damaged books, by an agreement whereby the books are to be used as paper stock only, the seller cannot, by virtue of the copyright statute, restrain the sale of such books by the purchaser in violation of the agreement.

17. What is a proper and sufficient delivery of goods sold is not always an easy question to answer. In general, it is sufficient whenever they are placed in the buyer's hands, or in his actual possession, or whenever action is taken that is equivalent to a transfer of possession. Thus, after landing goods on a wharf alongside of the ship that brings them, and notifying the buyer, this is sufficient delivery. Usage is often of the utmost importance in determining the true answer. In general, a delivery is sufficient that puts the goods within the actual reach or power of the buyer with immediate notice to him, so that there is nothing to prevent him from taking actual possession of them.

[1] In Clemens v. Estes, 22 Fed. 899, the court said: "In the absence of any notice of the contract, the defendants had a right to buy books from agents who lawfully obtained them by purchase from the plaintiff or his publishers, and had a right to advertise for sale and to sell such books at any price they saw fit. The plaintiff may have a right of action against his agents for the violation of their contract, and, from all that appears, they might be enjoined from doing what they had covenanted not to do." See valuable note, 55 L. R. A., 631.

18. When from the nature or situation of goods an actual delivery is difficult or impossible — for example, timber floating in a boom-slide — such acts as touching it, or going near and pointing it out, complete the delivery.

19. Once a contract was made for the delivery of timber of a particular description that was delivered, but never completely accepted, because it was defective. It was decided that the buyer should have offered to return the timber soon after the deficiency was discovered; or, at least, within a reasonable time after the discovery, should have given notice of his intention of not accepting it. If this is not done, and the timber is carried off by ice or other accident, the seller may recover its value.

20. In delivering portable articles, neither time nor place of delivery having been mentioned, the rule is, they must be delivered at the place where they are at the time of the sale — the store of the merchant, the shop of the manufacturer or mechanic, or the farm or granary of the farmer where they are kept. When a time for delivering them is fixed by the contract, the seller must seek the buyer at his residence, and there tender the articles. If they are heavy or cumbersome the seller must seek the buyer a reasonable time before the day of delivery, and ask him to appoint a place for delivering them.

21. On the sale of things at sea an endorsement and delivery of the bill of lading or other instrument is sufficient to complete their delivery, and the buyer, in like manner, can transfer them to another by his own

endorsement and delivery of the bill of lading. The seller should send or deliver the bill of lading to the buyer within a reasonable time: and his refusal to do this has sometimes justified the buyer in cancelling the sale.

22. A delivery of a fixed quantity of merchandise is not completed by a tender of a bill of lading for a larger quantity. If anything remains to be done — for example, separation from a larger mass before it can become the property of the other party — there can be no tender or delivery until after the separation has been made. The ownership of the thing tendered is transferred to the person to whom the tender is made whenever he is under an obligation to receive it.

23. The question of delivery is sometimes important from another point of view. Not infrequently goods are sold by persons who are on the verge of bankruptcy in order to prevent them from coming into the possession of their creditors, who, notwithstanding, keep them as if no sale had been made. As goods are usually transferred soon after they are sold, when this is not done, the transaction is generally regarded as a fictitious sale for some unlawful purpose like that just mentioned. In such a case, should a third party without knowledge of the sale purchase the goods from the seller, he would gain a valid title by acquiring possession of them, and could hold them against the other pretended purchaser. Again, unless delivery or possession accompanies the transfer of the right of property, the thing sold may be taken by the creditors

of the seller. In other words, while he retains possession of his goods, he is regarded ordinarily as the owner, and they may be taken by proper legal proceedings by his creditors. His retention of them may be explained, and if this be perfectly consistent with honesty, and especially if the delay in transferring their possession was brief, the title of the first buyer would be respected.

24. Until a delivery of goods has been made the seller is bound to keep them with ordinary care. Having observed this, he is not liable for any loss or depreciation, unless arising from some defect that he had warranted did not exist. Thus, A sold a quantity of beef to B, who paid the purchase money. It was agreed between them that the beef should remain in A's possession until it was sent to another place. Some time afterward B received a part that proved to be bad, and an inspection disclosed the unfitness of the entire quantity. The court decided that, as the beef was good at the time of the sale, the buyer must bear the loss.

25. Sometimes goods are sold in a shop or store and put into a parcel, or otherwise made ready for delivery to the buyer in his presence, and he requests the seller to keep them for awhile. In such a case the property in them passes, and the seller becomes the bailee, or keeper of them for the buyer. Consequently their loss, while in the seller's possession, without his fault, would be the buyer's.

26. The seller must send the goods in the way directed by the buyer. Having complied with the

seller's direction and exercised ordinary care over them until their delivery to the agent of the carrier, the seller's responsibility is ended as completely as if they had been put into the hands of the owner.

Should the buyer neglect to give directions the goods must be sent in the ordinary way, or as usage has determined. Generally, customary and proper precautions should be taken to prevent loss or injury in transporting them. If this is taken the goods are sent at the buyer's risk, and the seller is not responsible for any loss. But he is responsible should any loss or injury happen in consequence of neglecting to take such care or precaution. Should he send them by his own servants, or should he carry them himself, they would be in his possession and at his own risk until delivery.

27. A seller has a right to retain possession of goods sold, unless they are sold on credit, until the price is paid. This right is called a lien, which means a right to retain possession of them until some charge on them or some claim against them is satisfied. But he loses his lien whenever he voluntarily parts with their possession, or by their delivery to another. Furthermore, the delivery of a portion is regarded as a delivery of the whole; or a symbolical delivery — for example, the delivery of the key of a warehouse in which goods are stored — transfers the right of possession of them to the buyer.

28. As the seller, by delivering goods to the buyer, loses his lien, so, he cannot afterward retake and hold them, should the buyer fail to pay for them as he has

promised. He can, though, by agreement, retain his ownership. At the time of delivering them, if the buyer agrees that the seller's ownership shall be preserved until he has paid for them, the agreement would be valid, and the seller could reclaim his goods, if he desire, *from the buyer.*

29. While goods are in the possession of the seller or of his agent, or are in transit from him to the buyer, he has a right to refuse or stop their final delivery on learning that the buyer is in failing circumstances. This is an old rule of law, and the reason for it is plain. It is to save the seller from loss. Why should he deliver his property to an irresponsible person, or to one who is unable to pay for it? The law does not require him to do so unreasonable a thing.

30. A buyer who knowingly receives goods so deficient or so different from what they should have been that he might have refused them waives the objection, and is liable for the whole price unless he can show a good reason for not returning them, as in the case of materials that are innocently used before discovering their defects. Thus, a man bought a chandelier that was warranted sufficient to light a room of defined dimensions. After keeping it for six months he desired to return it and refused to pay for it. The court declared that he had kept it too long, although it was not sufficient for the purpose, and not as good as the warrant specified. Sometimes two or three months, or even a shorter period, is regarded as too long to permit a return of the thing purchased. How long it may be kept must depend largely or principally on the nature

of the thing and the use that is to be made of it. Though the buyer cannot return it, yet, when the price is demanded, he may set off the injury he has sustained by reason of the seller's failure to fulfil his promise. The seller, therefore, cannot recover the entire price, but only the value of the thing sold to the buyer. But a long delay or silence may imply that the buyer has even waived the right to demand a reduction.

31. In a contract of sale there is sometimes a clause providing that a mistake in the description, or a deficiency in the quality or quantity, shall not avoid the sale, but only give the buyer a right to make a deduction or to demand compensation. Nevertheless, a great mistake or defect, affecting materially the availability of the thing for the purpose for which it was bought, would render the sale void, because the thing sold is not the thing the buyer desired and which ought to have been furnished. Of course, it is not easy to determine this mistake or defect, or what must be regarded as a non-compliance with the contract so far as to justify the buyer in refusing to receive the goods. Like many principles of law, while the principle is clear enough, its application must depend on the facts in each case.

32. On some occasions many things are ordered at one time and by one agreement. In such cases generally, the buyer may refuse to receive a part without the rest, but, if he accepts any of them that is severed from the rest, he will be regarded as having given a separate order for each thing, and is required to receive them as they are tendered, unless some

distinct reason exists for refusing to receive them. The purchase of each thing at an auction, by different bids, and especially after marking the name of the buyer against each thing, is regarded as independent of the others. But the buyer of several things related to each other, no one of which would have been bought without the others, is not obliged to take one or more unless he can have all. The question whether it is one contract, so that the buyer shall not be bound to receive any one thing unless all of them are tendered to him, must be determined by ascertaining from all the facts whether the things belonged together. Should the conclusion be reasonable that no one thing would have been purchased without the others, then they must be taken together, otherwise each thing may be regarded as purchased separately. The buyer may have, by the terms of the contract, the right to redeliver the things purchased. For it is often agreed that the purchaser may return the goods purchased within a fixed or reasonable time. He may also have the right to return them if they prove to have, or not to have, certain qualities, or on the happening of a specific event. In such cases the buyer must prove that the circumstances existed that justified him in returning the things purchased. Furthermore, in such cases, the property in the things purchased passes at once to the buyer as in ordinary sales, subject to his right to return them, given to him by the agreement. If he does not exercise this right within the agreed time or within a reasonable time, should none be fixed by agreement, the right to

return them is wholly lost; the sale becomes absolute, and the price of the goods may be recovered. Again, if, during the time the buyer has them in his possession they are so misused as to impair their value, he cannot tender them back, and is liable for the price.

33. If a contract for the delivery of lumber, for example, be an entire one, the party who is entitled to it may accept a partial performance, and the contractors have a right to recover for the lumber thus delivered. On the other hand, if the remainder is not delivered the buyer may set off his loss or damage occasioned by the non-fulfilment of it.

34. When two persons enter into a contract, and, after a partial performance by one of them, the other denies its existence and gives notice of his intention to disregard it, the other party may, at his option, perform it fully and enforce it, or consider it at an end and recover for what he has done.

35. As the law does not require anyone to do a forbidden thing, no contract can be enforced that is illegal or contrary to law, or that is tainted with illegality. When, however, the illegal can be separated from the legal parts, this may be done. Thus, should a person agree for a thousand dollars to sell and deliver a quantity of merchandise and also to assist the buyer in some contemplated fraud, he would be bound to sell and deliver the goods because the consideration was legal and this part of the promise also, but he could not assist in the fraud, because this part of the promise was illegal.

36. Fraud vitiates and avoids in law every contract and every transaction. Consequently, an unlawful representation by which a sale is effected, or a purchase of goods with the expectation of not paying for them, or hindering others from bidding at auction by wrongful means, or selling at auction and providing by-bidders to increase the bid, or selling "with all faults" and then purposely concealing and disguising them, will avoid a sale. No title or right passes, and the innocent party, whether buyer or seller, may insist that the fraudulent party shall not take advantage of his own fraud to avoid the sale. On one occasion a man advertised a ship for sale at auction with all faults, but purposely put her in a position where an important fault could not be easily detected. This act avoided the sale.

37. A buyer on whom a fraud is practised has a right to cancel the sale, but he must do this within a reasonable time after discovering the fraud. The delay must be brief unless he can show a good excuse.

38. On the other hand, a defrauded seller may cancel the sale and sue for the price of the thing sold. If, however, the fraudulent buyer gets the goods on credit, and the seller sues for the price of them before the credit expires, this is a confirmation of the sale, including the terms of credit. Consequently, he thereby waives the right to cancel the sale, and he has no right to demand the price until the period of credit has wholly expired.

39. Whenever a party who has been defrauded

by any contract brings an action to enforce it, this is a waiver of his right to cancel it, and is a confirmation of the contract. One may inquire, what then ought to be done in such a case? Plainly, he should sue to recover for the injury he has sustained, but he ought not to recognise the contract itself.

SUBDIVISION 3. CONTRACT OF WARRANTY

1. Sales with an express warranty.
2. Illustration of a warranty.
3. What language or conduct is a warranty; estimates.
4. A warranty may be expressed or implied.
5. The law does not imply a warranty from a full price.
6. How the law regards the vendor's superior knowledge.
7. Affirmations of quantity and quality.
8. A mere representation is not a warranty.
9. Illustration of the principle.
10. Adulteration.
11. There is an implied warranty by the vendor of title.
12. Also in kind with the commodity sold.
13. Also that goods are like the sample.
14. Also of a thing supplied for a special purpose.
15. Is a bill of sale a warranty that the article conforms to the description?
16. The rule concerning provisions.
17. When the buyer can return the goods sold with a warranty.

18. The sale of one's business.

1. Next may be considered sales that are made with a warranty. By this is meant a statement of some kind that forms a part of the contract. A warranty may be general, or particular and limited. A general warranty does not extend to defects that are known to the purchaser, or that are open to inspection and observation, unless the purchaser at the time is unable to discover them readily, and relies rather on the knowledge and warranty of the seller.[1]

2. A contract to deliver iron, for example, made in a particular place, in consideration of a sound price that is paid, is fulfilled by delivering iron made there which the party believed was good, though on trial it proved to be positively bad. The court remarked, in a case of this nature, that the buyer was evidently content, at the time of making his contract, to take his chances that the iron would be of good or bad quality, provided it were made of metal selected honestly for that purpose from the place mentioned. By way of additional illustration, a sale was made of a number of kegs of lard grease, a part of which was inspected by the purchaser before making his purchase. He declined to examine more. He received a bill of sale in which the article was invoiced or described as lard grease. There were no false representations, nor was any deceit practised, nor did the seller know of any defect in its quality, al-

[1] Subdivision 8, of Sec. 2, of this chapter should be read in connection with this subdivision.

though a portion proved to be of an inferior quality. Nothing could be recovered.

3. On the sale of a quantity by estimation, and without deception, each having equal means of judgment, the vendor cannot recover, should the quantity prove to be less than his estimate, or the seller, should it prove to be more. "After the funeral has passed the dead cannot be resurrected."

4. A warranty may be either express or implied. "Any affirmation," says Beach, "of the quality or condition of the thing sold, made by the seller at the time of sale for the purpose of assuring the buyer of the truth of the fact affirmed and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty."

An implied warranty is created by law — for example, that the possessor of goods who offers them for sale as his own has a title to them.

5. The law generally does not imply a warranty from the fact merely that a full price is paid.[1] The maxim of the law "caveat emptor," let the purchaser beware, prevents this. As a general rule, mere silence on the seller's part is not fraud; but, if the usage of trade requires that a declaration of defects should be made whenever they exist, his silence is regarded as a warranty against them. Simple declarations of opinion are not a warranty.

6. There is a marked tendency to depart from this rule in sales of articles of which the seller is presumed

[1] Except in South Carolina and Louisiana.

to have a knowledge superior to that of the buyer — *e. g.*, jewels, medicines, and the like. "In this class of cases, the buyer and the seller do not deal on equal terms. The vendor is professedly an expert." [1]

7. Affirmations of quantity or quality that are made during negotiations for sale, to effect that end, which are successful, are a warranty. Thus, in New York, a representation was made by a seller that his flour was superfine, or extra superfine in quality, and worth a shilling more a barrel than common flour. To this statement the seller added another: that the buyer might rely on his representation. This was regarded as a warranty of the quality of the flour. In another case the seller or vendor of a horse said to the buyer, "You may depend that the horse is perfectly quiet and free from vice." This was regarded as an express warranty.

8. A mere representation is not a warranty. The relation between buyer and seller is not confidential. If the buyer, instead of requiring an explicit warranty, chooses to rely on the opinion of one who knows no more about the matter than he does himself, he can only blame himself for any loss that he may consequently sustain. In a case in which this principle was applied a buyer sought to recover for a loss occasioned in the purchase of coal. It was purchased at a price somewhat less at that time than that of first-class coal. The buyer complained that it contained an unusual percentage of slate and dirt, but the court

[1] See § 12, p. 471.

declared that he got substantially the kind of coal for which he bargained. On another occasion an action was brought on a warranty by the purchaser of some goods that had been represented as fit for the China market. He produced a letter from the seller saying he had goods fit for the China market that he offered to sell cheap. The court declared that such a letter was not a warranty, but merely an invitation to trade, and that it had no specific reference to the goods actually bought by the buyer.

9. In one of the cases it was remarked that, if mere representations were to be treated as part of the contract, it would not be easy to see why they should not be thus treated in all contracts, and if they were the law would foster a spirit of litigation by encouraging every man who was disappointed in the advantage expected from a bargain to drown his sorrows by an appeal to the law. The law gives reparation for broken contracts, but it does not attempt to satisfy mere expectations. It is especially important that this should be the rule respecting representations of the quality of the goods sold, for there is nothing on which both are more apt to differ and less apt to trust each other.

10. An adulteration which is only partial, and does not destroy the distinctive character of a thing, is not sufficient ground, usually, for setting aside a contract of sale; the buyer is bound by the bargain. In doubtful cases the test seems to be that the article shall be marketable under the name affixed thereto

by the seller. A case requiring the application of this principle related to the sale of teas. It was proved that they had been adulterated, but it was also proved that no teas of the same name or denomination were entirely free from adulteration by an admixture of leaves. The court remarked that, if a small degree of adulteration were permitted to affect the question of specific character, there would rarely be a binding sale. Wines are constantly adulterated with brandy, and brandy itself passes in the market, although often adulterated with alcohol. Drugs, chemicals, paints, dyestuffs, and a countless number of other commodities are constantly purchased by dealers or commissioners while knowing that they are not entirely free from admixture. Adulteration may be carried so far as to destroy the distinctive character of the thing altogether, and in doubtful cases there is, perhaps, no particular test except that of its merchantable character. In the case described the teas were resold to dealers at prices not greatly reduced, although they were put on their guard by the buyer's repudiation of the article. The buyer, therefore, was not deceived with respect to the specific character of the teas, however mistaken he may have been concerning their quality.

11. The seller of goods actually in his possession as owner is regarded by the law as warranting his own title by the sale. But this rule does not apply to one who is acting for another — for example, an executor, administrator, or other trustee; or to a public officer. A sheriff knows nothing about the title

of goods he may have seized by the direction of a creditor of a debtor.

12. In all sales of goods there is an implied warranty that the article delivered shall correspond in kind with the commodity sold, unless there are facts and circumstances to show that the purchaser took on himself the risk of determining, not only the quality of the article, but the kind he purchased. Therefore, should a person sell, and another buy, an article as blue paint, which is thus described in an itemized bill, this would constitute a warranty that the article delivered was blue paint, and not a different article.

13. Goods sold by sample are warranted to conform thereto in kind and quality, but there is no warranty of the sample itself. Thus, there was a sale of five bags of hops with an express warranty that the others were like the samples. The sale was in January, and at that time the samples were essentially like the commodity sold. No defect at that time was perceptible to the buyer. In July every bag had begun to spoil by heating. The seller knew nothing of this fact at the time of the sale. The court decided that there was no implied warranty that the other bags or bulk of the commodity was merchantable at the time of the sale, although the market price was given.

In one of the later cases, in which this principle was applied, a salesman showed a can of corn to a person, who, after examining it, was asked to prove its quality by cooking it himself. On the following day he made an offer that was accepted by the buyer. There was no fraud and no warranty of the quality,

and no facts showing that the parties intended that the quality should be precisely like that contained in the can that was examined and tested. Nothing was said or done on either side to give character to the can as a standard of the quality. The court held that it was a standard only of the kind. The court remarked that, so long as a commodity is salable, its different degrees of quality from good to bad are not the subject of an implied warranty. A commodity that is wholly unmarketable is substantially different in kind from one that is not so. In such case it is not the name merely that governs, but the fact that it is without market value and cannot reasonably be pronounced of the same kind as the sample.

14. There is an implied warranty that a thing ordered and supplied for a special purpose is fit for the purpose. For example, a wine manufacturer applied to a rope dealer for a crane rope. The seller's foreman went to the buyer's premises to ascertain the kind of rope required. He examined the crane and the old rope, and was told for what purpose the new rope was wanted. The seller, however, did not make the rope himself, but sent the order to a manufacturer who employed a person to make it. It was decided that, as between the parties to the sale, there was an implied warranty that the rope should be fit for the purpose intended. The seller, therefore, was held responsible, not only for the rope, but for the loss caused by its use.

15. It has often been considered whether a bill

of sale describing an article sold is a warranty that the article conforms to the description. The law is now well settled that such a description is a warranty. In one of these cases a bill of sale read thus: "H. and Co. bought of T. W. and Co. two cases indigo, $272." The article sold was not indigo, but Prussian blue. Fraud was not imputed to the seller, and the article was prepared in such a manner as to deceive exclusive dealers in indigo. The court regarded the bill of sale as a warranty that the article sold was indigo. In another case the bill read thus: "Sold E. T. H. two thousand gallons, prime quality, winter oil." The thing sold and actually delivered was oil, and winter oil, but not of prime quality. As in the other case, the court determined that the bill of sale constituted a warranty of the quality of oil. In another case a vessel was advertised for sale as "copper-fastened." This was decided to be a warranty that she was thus fastened as the term was understood by ship-builders and merchants dealing in that kind of property.

16. Finally, it may be remarked that one who sells provisions is always regarded as warranting that they are good and wholesome.

17. If a warranty is defective the buyer cannot return the article sold, unless there be an agreement to that effect, or fraud; he can only sue the warrantor and recover money for the loss incurred. If, however, one orders a thing for a special purpose, known to the seller, he may return it as soon as its unfitness is found out.

18. Another remark may be added concerning the sale of one's business. In this country not infrequently such a sale is made, the seller agreeing or promising that he will not pursue his trade elsewhere. The contract is void whenever the seller agrees to give up his business and never to resume it again at any time or anywhere, without limitation of space or time, for it is against public interest to permit a man to cast himself out from his business or trade during the rest of his life. But a contract for a proper consideration not to resume or carry on business within a specified time or place is valid. What these limits are have not been clearly defined. A contract not to carry on a business in a specified town, city, or state would undoubtedly be good, even though the contract should exclude the seller from continuing his business in a considerable section of the country.

SUBDIVISION 4. CONTRACT FOR CARRYING [1]

1. Carriers are private or public.
2. His responsibility when carrying for another.
3. The lien of a private carrier for his service.
4. Rights and duties of a public carrier.
5. Who are public carriers.
6. A public carrier may perform other duties.
7. He cannot refuse to carry goods without good reason.
8. The carrier must receive them in a suitable way and at proper times and places.

[1] See section on The Rights of Lienors, p. 758.

9. To whom he must deliver goods.
10. What is the end of a transit by a railroad.
11. What must be done by a carrier when others claim the goods.
12. He has a lien on them for his compensation.
13. His liability for the loss.
14. What is meant by the act of God.
15. A carrier is liable for the acts of his agents.
16. His liability beyond his own route.
17. He may limit his responsibility by special agreement:
    a.— But not for negligence,
    b.— Shipper must assent to the restriction,
    c.— Does the acceptance of a shipping receipt imply assent?
    d.— Is a stipulation fixing the amount that may be claimed in the event of loss valid?
    e.— Carrier may prescribe time within which notice of claims for loss must be given.
18. His liability for the baggage of passengers.
19. If placed under his care.
20. But he may limit his liability therefor.
21. Carrier's duty in carrying passengers.
22. How it differs from his duty in carrying goods.
23. Passengers cannot recover for an injury caused by carrier when negligent himself.
24. Where passengers can, and cannot, recover who stand on platform of street car.
25. A telegraph company is a common carrier.
26. How message must be sent.
27. Secrecy must be observed.

28. Must be delivered or sent beyond the line promptly.
29. Liability for failure of another line.
30. Force of conditions on a message-blank.
31. Reasonable skill must always be used in sending and delivering messages.
32. Payment for message.

1. Carriers are divided into two classes — private and public. A private carrier is one who carries for another from time to time, but does not pursue this employment as a regular business. The contract between him and the shipper is governed by the ordinary rules of law. He is required to receive, care for, and carry the goods in such a manner as he has agreed to do. The bargain may be oral or in writing. He must use such care as a man of ordinary intelligence would take of his own property under similar circumstances. And for any loss or injury that occurs while the goods are in his charge, arising from a want of care or intelligence, he is responsible. It is said that slight evidence showing a want of care is sufficient to throw on him the burden of accounting for their injury or loss.

2. When goods are carried by a private carrier without any compensation, then he is considered a gratuitous bailee, and the degree of care that he must exercise is very much less. Indeed, the law requires him to exercise only slight care in carrying them. The want of such limited care would be gross negligence, for which he would be responsible.

3. Whether a private carrier has a lien, or not, for

his service has not been clearly determined. An eminent authority says that he probably has one. If he incurs expense concerning the goods for sufficient reason and in good faith, he has a lien thereon for such outlay.

4. Having considered the law concerning a private carrier, the rights and duties and responsibilities of a common or public carrier will now be considered. These are very different from the rights and duties of a private carrier, and there are many reasons why they should be.

5. A common carrier, perhaps, should be more carefully defined. An eminent authority has said that one is a common carrier "who undertakes for hire to transport the goods of such as choose to employ him, from place to place." He undertakes the carriage of goods as his business, and this is the principal distinction between him and a private carrier. Truckmen, trainmen, porters, and all who undertake to carry goods for all applicants from one city or town to another, or from one part of a city to another, are common carriers. So are proprietors of stage-coaches and hackney-coaches. In recent times the business of carrying goods and passengers is largely conducted by railroads and water-transportation companies, including canal companies. Ordinary sailing vessels are sometimes said to be common carriers. The boat lines or river canals are common carriers, and so are ferrymen. A steamboat, generally employed as a carrier, may be used for a different purpose, like towing a vessel out of harbour, and, when this is done,

her usual character does not attach to this particular employment. Consequently, should a loss occur in towing a ship, the owner of the steamboat would be liable only for the negligence of those whom he employed.

6. The same person may be a common carrier and also hold other offices or relations. He may be a warehouseman, a wharfinger, or a forwarding merchant. The peculiar liabilities of a common carrier do not attach to any of these offices or employments. Thus, a warehouseman is liable only for the loss of goods that are taken to be stored, if caused by his own negligence. He is not, like a common carrier, an insurer of the goods. A carrier who receives goods to be stored until he can carry them, or who, at the end of the transit, stores them for a time for the safety of the goods or the convenience of the owner, is liable as a warehouseman only while they are thus stored. But, if he puts them into his store or office only for a short time, and for his own convenience, either at the beginning or the end of the transit, they are in his possession as a carrier. As a general rule, the deposit of goods, in whatever place or building, is secondary and subordinate to carrying them.

7. He must take the goods of all persons that are offered to him. He cannot refuse to receive any without good reason, for, while announcing himself as engaged in this business, he makes an offer to the public that becomes a contract with all who accept it. He may, indeed, demand his compensation, and, should the shipper refuse to pay, decline to carry his

goods; nor is he required to carry goods on the offer of security instead of money. So he may refuse if his means of carriage are already fully employed, or if he cannot carry the goods without danger to himself or to them, or without extraordinary inconvenience; or, again, if they are not such goods as fall within his regular business. He is always entitled to his usual charge, but not to an unusual compensation, except for an unusual service.

A carrier cannot be required to transport dangerous articles. He may exercise his option when they are offered to him. Should, therefore, gunpowder, nitroglycerine, and the like be offered, he may impose his own terms in agreeing to transport them.

8. A carrier is bound to receive them in a suitable way and at proper times and places. If he has an office or station he must have proper persons there, as well as means of security. During the transit and at all stopping places care must be taken of the goods, appropriate to their care. If he have a notice, regular or otherwise, of the need of peculiar care, as "glass, with great care," or "this side uppermost," the shipper is bound to comply with such directions, unless they impose unnecessary care or labour.

The shipper is bound by all reasonable regulations relating to the manner of delivery and entry of parcels, and the information to be given by him of their contents, the rules of freight, and the like; for example, the carrier "will not be responsible for goods above the value of a certain sum, unless they are entered as such and paid for accordingly."

9. Furthermore, he must deliver the goods to the consignee, or to the person appointed by him, and at the proper time and place. And if a person authorised to receive them declines to do so, the carrier must keep them for the owner. In so doing, however, he is no longer under the strict liability of a carrier, but simply that of a warehouseman. He must also keep them for the owner if he has good reason to believe that the consignee is dishonest and will defraud the owner of them. Concerning the time of their delivery, this must be within the proper hours for business. With respect to the manner and place of delivery, this must depend on the nature of the goods and on usage. They should be left, and with such a notice as will secure their early conveyance and safe reception by the owner or consignee. Something also depends on the mode of conveyance. A man may carry a barrel into a house and deliver it to the owner or his servant; a wagon or cart can go to a gate or into a yard and make delivery. A vessel can go to one wharf or another, and must go to the one that is reasonably convenient to the consignee, or to the one mentioned in the agreement. When delivery is not to the owner personally, or to his agent, immediate notice should be given to the owner. In truth, it may be said that the carrier cannot be made responsible without a notice of delivery to him; on the other hand, he cannot make adequate delivery without a similar notice. Whenever the carrier has a place of delivery, as at a station, the owner must take notice of this; on the other hand, a carrier must regard the

direction of an owner who has designated how his goods shall be delivered.

10. Railroads terminate at their stations, and, though goods may be sent by wagons to the houses or stores of consignees, this is not usually done, as the transit by the carrier is regarded as finished when the goods have reached the carrier's station or terminus. Usually the consignee of goods sent by a railroad receives a notice from the consignor when to expect them, and this is so common that it is hardly necessary for the agents of the carrier to give notice to the consignee. But this should, we think, be given whenever it is necessary.

11. It may happen that a third party claims the goods under a title opposed to that of the consignor or consignee. Should the carrier refuse to deliver them to such party, and, in the end, his legal right to them should be established, the carrier would be liable to him. But the carrier may demand clear evidence of the claimant's title, and, if this be not satisfactory, he may demand security and indemnity. When the evidence or the indemnity is withheld he cannot be held liable for not delivering them to him, unless his better title was very clear, or unless the carrier did not act in good faith or with proper discretion. If he delivers the goods to the claimant the proof by him of a good title is an adequate defence against any action by the consignor or consignee for not delivering them.

12. A carrier has a lien on all the goods he carries for his compensation. While he holds them for this

purpose he is not liable for loss or injury as a common carrier, but only for his own negligence. He can recover his compensation by any of the usual means whereby a lien on property can be enforced. If he carries goods for a party who does not own them, by his request, and at the end of the transit the true owner discovers or interposes and claims them, the carrier may recover his compensation whenever he has rendered a service or benefit to the owner for conveying them. But it would be a personal claim only, for which the carrier would have no lien.[1]

13. The liability of a common carrier for the loss of goods is peculiar. It is said to spring from the public nature of his employment, but the true reason is the ease with which he may defraud the owner. Another reason is the owner's difficulty to prove the carrier's wrong. The general rule for the carrier's liability is for any loss or injury to goods under his charge, unless it was caused by the act of God, or by the public enemy. The act of God, so the courts have said in some cases, means the same thing as unavoidable accident. This meaning, though, is not everywhere accepted. It is asserted that the rule is intended to hold the carrier responsible wherever he causes the loss, either by negligence or design. Consequently, the act of God means some act in which neither the carrier himself nor any other man had any direct and immediate agency. If, for example, a house containing goods is struck by lightning, or is blown down by a tempest, or washed away, this

[1] 2 Parsons on Contracts, 209.

is an act of God for which the carrier is not liable. No man could have directly caused the loss. As a general rule, a common carrier is always liable for loss by fire unless it was caused by lightning. It might be true that, after the lightning, tempest or inundation, the carrier was negligent and lost the goods which could have been saved by proper efforts, or that he took opportunity to steal them. If this were shown the carrier would, of course, be liable, but the law will not presume this, if the main cause was one of which the carrier could not have been guilty. So, a carrier would be liable for loss caused by robbery, however sudden, unexpected, and irresistible.

14. The act of God may be negative merely; for example, the wrecking of a vessel from a failure of wind. It includes also any loss springing from the inherent nature of the thing, like fermentation or decay, assuming, of course, that the carrier has taken proper precaution to prevent it.

15. The general principle of agency extends to common carriers, and makes them liable for the acts of their agents that are done while discharging their agency or employment. So, too, the knowledge of a carrier's agent is his knowledge, if the agent was authorised expressly or by the nature of his employment to receive or possess such knowledge. But an agent for a carrier may act for himself, a coachman may carry parcels for which he is paid personally and does not account to his employer. In such a case he is not liable unless the owner of the goods supposed

the coachman carried them for his employer, and was justified by his conduct in thus believing.

16. Carriers may be liable beyond their own route. It is a very common thing for them to share the profits arising from the transportation of merchandise over their several routes; and formerly when they were thus united in carrying over a continuous line, they were liable for the loss arising on any part of it. It was also said that, if they were not thus united in fact, but seemed to be so, and justified the sender in supposing that they were, they were equally liable. But now, if a carrier takes goods and promises to transport them to the end of his line and then to forward them by another carrier, he is liable as a carrier to the end of his own route, and also if he neglects to fulfil his promise to deliver them to the next carrier; but after he has thus fulfilled his promise he is not liable for what may happen afterward. And at the present time this is the usual practice of transportation companies composing joint lines. The first carrier agrees to be responsible for loss over his own route and to make a delivery to the next carrier, and so on, until the transit is completed.

17. A carrier, however, may by special agreement limit his responsibility for carrying goods. Once it was contended that as he was an insurer of their safety, it was contrary to the policy of the law to lessen this liability by any agreement whatever.

(*a*) This ancient rule has long since been modified and, by the modern rule, a carrier can relieve himself from all responsibility for the loss of goods not arising

from his own neglect. Carriers are thus permitted to relieve themselves from liability as insurers, for the reason that goods are carried at a lower figure than they would otherwise be. The tendency of compensation for carrying is constantly downward, but one of the considerations is that the shipper will become his own insurer, or, in other words, will assume the risk of loss arising from fire or from negligence. He often insures his goods in insurance companies doing that business, and thus protects himself against the risk of loss that was once undertaken or borne by the carrier. The making of such agreements is universal, and some of the courts recently have returned to the extreme ground that it is proper enough for a carrier to relieve himself by agreement from all risks, whether arising from his own negligence or otherwise, when the other party receives an adequate consideration for undertaking or assuming the risk himself; and we are inclined to believe that this extension of the authority of a carrier to relieve himself from negligence will be generally adopted. Why should not a shipper who can get his goods carried for less than the usual rates, on assuming all the risks of transporting them, be permitted to make a contract of this character?

(*b*) But the carrier cannot limit his common law liability without the shipper's assent. He may insist on having his goods carried in this manner, and, should the carrier decline to carry them, he would be liable.

(*c*) Is assent to the limitations proposed by a carrier

given by simply accepting the ordinary shipping receipt that contains them? With the exception of the states of Illinois and Ohio, assent is implied from accepting such a receipt without objection. As this is a matter of great practical importance, the following utterance from a recent judicial decision may be added: "It is the rule, rather than the exception, for common carriers to stipulate for a release from the stringent liability of an insurer, and which otherwise the law would impose upon them; and, according to the customary course of business, such stipulations are contained in the bill of lading issued by the carrier. This custom is so general that all persons receiving such bills of lading must be presumed to know of such custom, and they are also charged with the knowledge that it is one of the offices of such instruments to state the terms or conditions upon which the goods therein described are to be carried; and for this reason the acceptance of such a paper by the shipper, without dissent, at the time of the delivery of his goods for shipment, when no fraud or imposition has been practised upon him, is to be regarded as conclusive evidence that he agrees to be bound by all lawful stipulations contained in such bill of lading." [1]

Furthermore, this presumption is not affected by the shipper's failure to read the receipt, even though he was unable, for any reason, to read it. He is bound just the same.

(*d*) The amount for which a carrier will be liable

[1] Montagu v. Hyde, 82 Fed., 681.

in the event of the loss of the goods may also be stipulated, though the courts differ greatly concerning the effect of the stipulation. Some of them maintain that the sum stipulated is definite and must be paid whether the goods are worth more or less. Other courts hold that this is a maximum sum, and, if the goods are really worth less, the carrier is not prevented from proving the fact and escaping from paying more than their just value. Thus, the stipulated value of a horse delivered to a carrier is two hundred dollars. The animal is lost or ruined while in the carrier's possession, yet he succeeds in proving that the animal was twenty years old, blind as a bat, had the heaves and all other ills, and was not worth more than ten dollars. Only this sum, where the above ruling prevails, can be recovered.

A still more important question divides the courts. Is such a stipulation concerning the value of a thing shipped binding on the shipper in cases of negligence on the part of the carrier? Many courts hold that it is, others that it is not. The federal rule sanctions the stipulation. Says Justice Blatchford, speaking for the highest federal tribunal: "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight

and secure the carriage if there is no loss; and the effect of disregarding the agreement after a loss is to expose the carrier to a greater risk than the parties intended he should assume."

18. A carrier of passengers is responsible for their baggage, though only to the extent of what is fairly and ordinarily carried. What this quantity may be must always remain an open question of fact, for determination by the jury in any legal controversy. There can be no precise and definite standard. A traveller on a long journey needs more baggage than one on a short journey, and a traveller to some places and for some purposes needs more baggage than for other places or for other purposes. The reason for the rule is to prevent the carrier from becoming liable by the fraud of a passenger, for this would be the case if he could carry merchandise as baggage, and thus make a carrier of passengers a carrier of goods without knowing it. He is also to deliver to each passenger his baggage at the end of the route, and is held liable should he deliver it to a wrong party, or on a forged order. Generally, a carrier of passengers by rail, steam, or stage carries the baggage of a passenger without receiving specific payment for the service. But the law considers a payment for this so far included in the payment of fare as to form a sufficient ground for the carrier's liability.

19. A carrier is liable only for goods or baggage delivered to him and placed under his care. Consequently, when a passenger keeps his baggage, or any part of it, in his own hands, or within his own

control, instead of delivering it to the carrier, or to his servant, he cannot recover for any loss or injury that may happen to it.

A carrier may stipulate that the shipper must give notice of any claim for loss or damage within a reasonable prescribed time. This stipulation controvenes no public policy, excuses no negligence, and is consistent with holding the carrier to the fullest measure of good faith and diligence.

20. Not infrequently carriers have a rule prescribing the maximum loss on baggage for which they will be responsible. By this rule it is generally declared that, for a trunk, valise, or other article, they will not be responsible for more than a fixed amount, unless the owner shall give notice of its contents at the time of delivering the same. In some cases it has been held that these notices fixing the amount of their liability are not binding on passengers, and they surely are not whenever passengers do not know of them. On the other hand, whenever they are known, why should passengers not be bound by such limitations? Surely, they are reasonable, and the courts on many occasions have enforced them.

The federal courts, however, will not interfere to overturn the diverse rulings of the state courts on this question. A state, therefore, which frowns on such a contract as against public policy is permitted, so far as the federal courts are concerned, to disregard the stipulation whenever the shipper sues for the loss of his property caused by the company's negligence, nothwithstanding his agreement to re-

frain from so doing. Quite recently a man shipped a horse from Albany, N. Y., to a place near Philadelphia in Pennsylvania. The amount to be recovered for the horse should the carrier prove negligent in transporting the animal was fixed in advance by the shipper at $100. The horse was injured at the end of the line of shipment, yet the shipper, notwithstanding his agreement, sued the carrier and recovered $10,000. By the law of New York, where the transit began, the agreement would have been sustained. The highest federal court refused to disturb the contrary decision of the Pennsylvania tribunal.[1]

21. A carrier of passengers must receive all who offer, carry them over the whole route and at a proper speed, demand only a reasonable, or the usual compensation, notify them of any peculiar dangers, treat all alike unless the dangerous condition or misconduct of a passenger requires different attention, and behave toward all with civility, and employ competent persons for all duties. Should he fail in any of these particulars he would be responsible for the injury thereby caused.

There is a clear difference between the contracts of carriage by a railroad or steamboat company and by an innkeeper. The carrier regulates the movements of the passenger, assigns him his seat or berth, and determines when, how, and where he shall ride, eat, and sleep, while the passenger submits to the rules and directions of the carrier. Consequently "every servant of the carrier to transport the passenger

[1] Pennsylvania v. R. Hughes, 191 U. S., 477.

safely . . . is constantly acting within the scope and course of his employment while he is upon the train or boat, because he is one of those selected by his master and placed in charge of the person of the passenger to safely transport him to his destination." For every negligent or wilful act inflicted on the passenger by the servant the carrier must respond. But the innkeeper does not take the guest, nor does he surrender himself. A room is assigned to him, but he is free to use it. "The servants of the innkeeper are not placed in charge of the person of the guest, to direct, guide, and control his location and action, nor are they employed to perform any contract to insure his safety; but they are engaged in the execution of the agreement of the master to exercise ordinary care for the comfort and safety of the visitor." Consequently "when the servants are not engaged in the course or scope of their employment, although they may be present in the hotel, they are not performing their master's contract, and he is not liable for their negligent or wilful acts." [1]

22. A carrier of passengers is under a more limited liability than a carrier of goods. The reason is that he has not the same control over them that he has over goods. Nevertheless, the liability of a carrier for passengers is very great. No proof of care will excuse a carrier if he loses goods entrusted to him for transportation, but proof of the utmost care will excuse him for an injury happening to passengers. A carrier of passengers is liable for any injury to them

[1] Clancy v. Barker, 131 Fed., 161, 165.

unless he can show that he took all possible care in carrying them.

23. Many a passenger who has been injured through the negligence of the carrier has failed to recover because he himself was negligent. This principle is of the highest importance, and runs all through the law. Thus, a traveller on a highway must look both ways and listen for trains at the very time he is approaching a railroad crossing. To omit this plain duty without any explanation is contributory negligence which prevents him from recovering for an accident, even though the railroad was negligent.

This rule was applied not long since to a bicycle rider who was about to cross a street-railway track. The court declared that it was "an unbending rule to be observed at all times and under all circumstances."

24. A passenger who stands on a platform, or rides on the steps of a street car, when there is a seat or standing room on the inside, assumes all the risk incident to his position. But, if there is no room within, and he rides outside with the knowledge and consent of the conductor, he is entitled to the same care and protection as the other passengers from known and avoidable dangers.

25. A telegraph company is a common carrier, but some peculiar principles apply to it requiring consideration. A telegraph company must have suitable instruments and competent servants, and must render such care and skill as the business requires. It must send all messages offered and deliver all that are re-

ceived, and must treat all customers in an impartial manner.

26. If the message be illegible an operator may refuse it, but, if received, he must read it as well as he can, and send it accordingly. He must not amend in any way, though it may be wholly unintelligible to him, for it may be understood by sender and receiver; he must, therefore, send the message literally, as written.

27. Secrecy is also another obligation. Employees are strictly forbidden by statute or common law from making the contents of messages known. Even if they are summoned as witnesses in courts of justice, they are protected from producing despatches or testifying to their contents.

28. Messages must be delivered promptly and to the right person. A company is also bound to send beyond its own line if this is obviously required by the address of the message.

29. Whether the company is liable for the failure of another line to do its duty depends on the sender's contract made with the receiver. Several lines may be so associated as to be liable as partners. In other cases a telegraph company may agree, like a common carrier of freight, to transmit the message to the next company, but without holding itself responsible for its negligence in further transmission and delivery.

30. Professor Parsons says the question finally takes this form: "Has the receiving line, by actual connection with other lines, by an appearance of connection sanctioned by the receiving line, by custom,

or advertisement, or otherwise, led their customer to believe, or justified him in believing, that they will send the message over the whole distance as over their own lines? Receiving pay for the whole distance may be prima facie evidence of such a contract, but it would be open to explanation." [1]

The conditions printed on the face or reverse of a blank message become a part of the contract for transmission. In this way a company may make all reasonable rules for the receiving, transmission, and delivery of its messages. It may require prepayment of them. It may also require repetition, in order to be responsible. This is a common rule among telegraph companies, and is declared to be reasonable and binding on the sender or receiver of the message. Says Chief Justice Chapman, in one of the cases: "It seems to us that one who elects to save the small sum charged for a more extended liability cannot reasonably claim the benefit of it in a business where careful operators are so liable to make mistakes, and that this principle applies to every stage of dealing with the message." [2] In Illinois the Supreme Court has taken precisely the opposite view, declaring that a message thus sent was a forced contract, unjust in conception, without consideration, and void. But the former view is more generally maintained by the courts in this country.

31. Of course, a company in all cases must use reasonable skill in transmitting and delivering its

[1] Vol. II., p. 285.
[2] Grinnell v. Western Union Tel. Co., 112 Mass., 71.

messages. The above rule does not protect a company against the gross neglect or indifference of its operators. A company may refuse to send a message if not repeated; but if sent without repetition it must, although not paid specially for the additional service, use ordinary care and skill.

32. To whom does a company give credit for the price of sending a message? The answer is, in the first place, to the sender. If sent without payment the receiver may take it nor not, as he pleases; if he refuses he cannot be held liable for the amount. But, if he takes an unpaid message, he must pay therefor. Finally, after receiving and opening the envelope containing a message, and especially after reading it, he cannot then decline to receive it and to pay for it, for he has received it.

§ 4. Contract of Negotiable Paper

1. What is a negotiable bill or note.
2. Its four characteristics.
3. Non-negotiable paper.
4. Promissory note defined.
5. Bill of exchange defined.
6. Similarity of endorsed note and bill.
7. Kinds of bills.
8. Check defined.
9. To be negotiable an instrument must contain proper words.
10. Promise must be unconditional.
11. Promise must be to pay money.

12. Amount must be certain.
13. Time of payment must be certain.
14. There must be no contingencies during life of the paper.
15. Effect of adding seal.
16. An instrument must be dated.
17. How can blanks be filled.
18. Instrument must be delivered.
19. Consideration.
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1. Notes, bills of exchange, checks, and other instruments are daily given by persons for various purposes. The most general division of them is into two classes — negotiable and non-negotiable. A negotiable instrument can be transferred by indorsement or delivery; a non-negotiable one can be transferred only by an assignment. Formerly, the transfer of notes was forbidden as a protection to the persons who made them. But this barrier was removed, first, from bills of exchange and afterward from promissory notes. Whenever, therefore, these instruments are so drawn that they can be transferred by indorsing and delivering them to the transferee or purchaser, or by delivery only, they are negotiable.

2. A negotiable instrument possesses four character-

istics. The first is that it can be so effectively transferred by the original holder or owner that the transferee can sue in his own name the maker or subsequent promisor for the fulfilment of his promise, should he fail to observe it. Second, should the instrument be stolen and transferred by a thief to another for a valuable consideration in the usual course of business and before maturity, the purchaser would acquire a perfect title, which he could not thus acquire to a horse or any other thing. Third, the holder of a negotiable note is entitled to the full amount mentioned on its face, and a defence which the maker could have made against the payee, had he kept it, will not avail against a later holder who acquired it in the usual course of business and before its maturity. Fourth, a negotiable instrument imports a consideration, like a sealed instrument. Between the immediate parties the truth may be shown, but not between others.

3. Notes and bills that are not negotiable are in common use. They can be transferred, but the transferee or holder is not so perfectly protected as the holder of a negotiable note or bill. The maker can always defend as effectively against a subsequent holder as against the original holder. "An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

4. The three kinds of negotiable paper that are best known in the commercial world are promissory notes, bills of exchange, and bank checks. A promis-

sory note may be defined as a promise or agreement to pay a specific sum at the time therein limited, or on demand, or at sight, to a person named therein, or his order, or to bearer. The person who promises to pay is called the maker, and the person who is to receive the money the payee. If a note is payable to bearer it can be transferred by delivery; if it is payable to order it can be transferred by indorsement, which consists in writing the name of the person to whom it is payable across the back. The person who indorses is called the indorser; and the one who receives it, the indorsee. In all cases the owner is called the owner or holder.

5. A bill of exchange may next be defined. Perhaps Byles's definition is as exact as any other; we know of no briefer. "It is an unconditional written order from A to B, directing B to pay C a certain sum of money therein named." By statute, "a bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer." The person who writes or draws the bill is called the drawer; the person to whom it is directed, the drawee; and after accepting, or agreeing to pay it, the acceptor. The person to whom the bill is payable is called the payee. If the bill is payable only to the person therein named it is not transferable or negotiable; but, if it is payable to him or to his order, it may be negotiated. When this is done the payee becomes

the indorser, and the person who receives it the indorsee.

6. In their general form a promissory note and a bill of exchange are quite different. To every bill there are three parties — the drawer, drawee and payee — while there are only two parties to a promissory note — the maker and payee. Again, the acceptor of a bill, or person who agrees to pay it, is the real or primary debtor. But the form of a note is so changed by transferring it to a third person that it is very similar to a bill. The indorser then resembles the drawer; the maker the acceptor; and the indorsee the payee.

7. Bills of exchange are divided into two kinds — foreign and inland. A foreign bill is drawn in one country and payable in another; an inland bill is drawn and payable in the same country. The several states of the Union are regarded as foreign in drawing bills. If the drawer and drawee of a bill reside in Pennsylvania and the bill is payable in New York, it is foreign; but, if the drawer and payee reside in Pennsylvania and the drawee in New York, it is an inland bill. The states in which the parties live should always appear by the instrument, as the courts cannot always infer their residence from the name of the city town, or other place mentioned. "Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill."

8. Lastly, a bank check may be defined: "A check is a bill of exchange drawn on a bank, payable on demand." By statute, "a check is a bill of exchange

drawn on a bank, payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange, payable on demand, apply to a check." It resembles a bill of exchange and is usually drawn payable either to bearer, or to the order of some person. Indeed, it is so nearly like a bill that, in some states, when it is not paid, the same steps must be taken to preserve the liability of the parties as are taken with a bill of exchange.

9. To be negotiable an instrument must contain proper words to indicate that purpose or intention, and the most frequent are the words "to order," or "to bearer." Though generally used in commercial instruments, and convenient and expressive, they are not the only stamps of negotiability. Words from which it can be inferred that the maker intended the instrument to be negotiable have that effect. A note for the payment of money, on which another stipulation or agreement has been indorsed by the payee, is to be regarded as a new instrument, and cannot be enforced until the stipulation has been performed.[1]

The law does not attempt to render paper negotiable to which the parties have not given this character. But, if a stipulation is merely of an explanatory nature, the negotiability of the instrument is not affected. For example, a statement in

[1] "An instrument to be negotiated must conform to the following requirements: It must be in writing, and signed by the maker or drawer. Must contain an unconditional promise or order to pay a sum certain, in money. Must be payable on demand or at a fixed or determinable future time. Must be payable to order or to bearer, and, where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainity." Neg. Inst. Law of Pa., Sec. 1 (and other states).

a note that it was given for advancements, or a requirement that notice to an indorser be sent at a specified place, or a stipulation stating for what purpose the note was given. Nor does the giving of security with a note for its payment destroy its negotiability. Nor will a clause authorising the holder to sell the security, should the maker not fulfil his promise.

A certificate of deposit issued by a trust company payable to the person named therein, or his assigns, is not a negotiable instrument within the Negotiable Instruments Law, it declaring that an instrument to be negotiable must be payable to order or bearer.[1]

10. The most general rule concerning the form of the promise is certainty. It must be unconditional, and this rule must be strictly observed, for, as an eminent jurist has remarked, if this were not done paper would soon cease to be a courier without luggage, and become loaded down with conditions and all kinds of impediments so that its usefulness would be greatly impaired, if not entirely destroyed.

11. The certainty required by law applies, first, to the medium of payment.[2] This can be money only.

[1] Zander v. New York Security and Trust Co., 178 N. Y., 208.
An order therefore that has no time of payment expressed, and is not payable to order or bearer is not negotiable. Westberg v. Chicago Lumber and Coal Co., 117 Wis., 589.

[2] "The sum payable is a sum certain, within the meaning of the [Neg. Inst.] act, although it is to be paid: with interest; or, by stated instalments; or, by stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall be become due; or, with exchange, whether at a fixed rate or at the current rate; or, with costs of collection or an attorney's fee, in case payment shall not be made at maturity."
Under this provision a mortgage note for a specified sum and payable at a certain future date was negotiable, though it provided that on default in interest or failure to comply with any of the conditions of the mortgage then the whole amount of the principal should, at the option of the mortgagee, become due and payable. Thorpe v. Mendeman, 123 Wis., 149.

Formerly, when the circulation of money varied greatly in value, a promise to pay in notes of the chartered banks of a state, or in addition to the stated amounts in bills of exchange, "the current rate of exchange," or "in current funds," at a place mentioned, or "in current bank notes," destroyed the negotiability of the instrument. A bill or note that is to be paid in goods or produce is not negotiable.

12. Not only must the medium of payment be certain, but also the amount. A stipulation, therefore, for a collection fee, should the maker not pay at maturity, destroys the negotiability of the instrument. This rule, however, does not prevail in all of the states. In many of them such a stipulation does not affect the negotiability of the instrument.

An individual sued to recover on a draft for $1,500. "400 C. A. R. L. No. 3362 — *via* A. R. L. B. L. direct." The words quoted, by the ordinary custom and usage of business, charged the payee with the knowledge that a certain number of cases had been shipped by a certain line and that the bill of lading went direct to the payee. As the draft contained an unconditional order to pay a sum certain in money it was negotiable and did not indicate that the amount of the draft was to be paid from the proceeds of the consignment.[1] But a stipulation to pay a reasonable attorney's fee should the note be placed in the hands of an attorney for collection after maturity is uncertain in amount and therefore non-negotiable.[2]

[1] Waddell v. Hanover Nat. Bank, 48 N. Y. Misc., 578.
[2] Lippincott v. Rich, 22 Utah, 106.

13. The time for payment must be certain.[1] If, nowever, the maker, solely by his own will, can pay at an earlier period, the negotiability of the instrument is not impaired.

14. Again, this rule — that a negotiable instrument must be certain and without contingencies — applies only to stipulations that affect its character during the period of its proper life — that is, before its maturity. A stipulation, therefore, not affecting the negotiability of an instrument during its specified term of life, does not in any manner affect its negotiable character.[2]

"An instrument is payable on demand: where it is expressed to be payable on demand, or at sight, or on presentation; or, in which no time for payment is expressed. Where an instrument is issued, accepted, or indorsed, when overdue it is, as regards the person

[1] "An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable: at a fixed period after date or sight; or, on or before a fixed or determinable future time specified therein; or, on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

"An unqualified order or promise to pay is unconditional, within the meaning of this act, though coupled with a statement of the transaction which gives rise to the instrument." It is therefore not applicable to a conditional sale note by the terms of which ownership of the thing sold remains in the seller, and the buyer is given the right to acquire it by performing prior conditions. Such an instrument is not a negotiable note. Third Nat. Bank v. Spring 50 N. Y. App. Div., 66.

[2] "An instrument which contains an order or promise to do any act in addition to the payment of money, is not negotiable. But the negotiable character of an instrument, otherwise negotiable, is not affected by a provision which: authorises the sale of collateral securities in case the instrument be not paid at maturity; or, authorises a confession of judgment if the instrument be not paid at maturity; or, waives the benefit of any law intended for the advantage or protection of the obligor; or, gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal."

A note containing a power of attorney to enter judgment thereon at any time after its date "whether due or not" is not negotiable. Wisconsin Yearly Meeting v. Bobler, 115 Wis., 289.

so issuing, accepting, or indorsing it, payable on demand.

"The instrument is payable to order where it is drawn payable to the order of a specified person, or to him on his order. It may be drawn payable to the order of: A payee who is not maker, drawer or drawee; or, the drawer or maker; or, the drawee; or, two or more payees, jointly; or, one or some of several payees; or, the holder of an office for the time being. Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

"The instrument is payable to bearer: when it is expressed to be so payable; or, when it is payable to a person named therein or bearer; or, when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or, when the name of the payee does not purport to be the name of any person; or, when the only or last indorsement is an indorsement in blank."

15. The maker should not affix a seal to his name. Once this had the effect of destroying its negotiability. Now whether it has this effect or not is declared to be a question of intention. A seal does not affect the negotiability of an instrument by the Negotiable Instruments Law. Furthermore, the presumption is that it was not added to render the note non-negotiable. Nor should a corporation affix its corporate seal unless it desires to restrict the negotiability of the instrument.

16. "Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement, as the case may be.

"The instrument is not invalid for the reason, only, that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom the instrument so dated is delivered acquires the title thereto as of the date of delivery.

"Where an instrument, expressed to be payable at a fixed period after date, is issued undated, or where the acceptance of an instrument, payable at a fixed period after sight, is undated, any holder may insert therein the true date of issue or acceptance and the instrument shall be payable accordingly. The insertion of a wrong date does not void the instrument in the hands of a subsequent holder in due course, but as to him the day so inserted is to be regarded as the true date."

17. "Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper, delivered by the person making the signature in order that the paper may be converted into a negotiable instrument, operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who

became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

18. "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and, in such case, the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

19. Every negotiable instrument is deemed, prima facie, to have been issued for a valuable consideration, and every person whose signature

appears thereon to have become a party thereto for value.[1]

20. Next may be considered the parties to such an instrument. In every contract there must be two or more parties who possess the legal ability to make, or who can be compelled to perform, their promises or undertakings; but some persons who make and indorse negotiable paper, though disabled from contracting generally, cannot defend on the ground of personal disability. The law has wisely limited the authority of a minor, and he cannot engage in trade, or give bonds, or make or indorse notes. If, therefore, he should become surety on a note, the contract must be confirmed after he has attained full age. A mere acknowledgment or part payment would not suffice. But, if he should give a note for necessaries, there could be a recovery on this, or on the contract for them. Again, if he should indorse a note, the holder would acquire a good title against all the parties thereto except the minor himself.

21. At common law a married woman cannot sign notes, but this right has been conferred on her in most states by statute. Her authority to sign them differs somewhat in the various states, but, in general, it

[1] Value in any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time.

Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained amount or otherwise.

may be said that she possesses ample authority to sign for whatever may be needful in the transaction of business, in the purchase of property, in the payment of her debts, and, generally, for any purpose relating to her welfare.

22. Notes and other instruments are often made and taken by agents. "No particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency." Numerous questions have arisen concerning their authority. Some of these have related to their general authority, while others, when this was lacking, to the conduct of their principals in ratifying or disapproving their conduct. Let us first consider the cases of an agent's authority to give notes. A clerk in a store has no authority to borrow money and draw bills in the name of the firm that employs him. An agent who is authorised to sell for cash cannot take promissory notes for the purchase money. But the cashier of an incorporated bank is the general executive officer to manage its concerns, and his official notes or indorsements are regarded as those of the corporation. The president of a bank has authority to accept security for a note in payment of a debt due to it, and also a new note in settlement of the old one. Likewise, an insurance company is bound by the acts of its agent who accepts notes for the premium.

23. The cases in which an agent cannot be held personally will next be considered. An officer of a corporation who makes known his principal's name

is not liable, even though he should give a note in his own. Obviously, he is not personally liable when he contracts on behalf, or in the name of his principal in performing the business of his agency. One of the most familiar applications of this principle is the drawing of a bill by an agent on his principal for a purchase made solely for the principal's benefit. For example, an agent who is authorised to purchase cotton has the right to draw on his principal in favour of the bank that advances the money to pay for it. Should an agent's act be disapproved the cotton must not be received, otherwise the principal must accept and pay the draft. Nor need the agent show his authority to make the purchase to the bank that cashes the draft. If he has the authority that is enough without showing the evidence of it.

24. As persons of unsound mind also give and indorse notes their liability must be considered. A person who has given his note and received the money thereon from a bank or other party not knowing his condition must pay unless a fraud was practised on him. He cannot be permitted to obtain the money of innocent parties and retain the same.

An accommodation maker or indorser of a note who receives no benefit therefrom and whose mind was not sound at the time of making or indorsing it, whether this was known at the time by other parties or not, is not liable. But he is liable when his indorsement was a renewal of another given at a time when his mental soundness was unquestionable.

25. A person who takes advantage of the drunken-

ness of another, and procures his signature to a note, commits a fraud, and the transaction can be repudiated or confirmed. Whatever the rule may have been, now, if the fraud affects the individual interests of the parties merely, the transaction may be ratified. The note, though, must be based on a sufficient consideration and be free from any other legal defect.[1] The contract of a habitual drunkard, after his legal condition has been ascertained, is void.

The defence of drunkenness cannot be interposed against the holder of a note for value who has taken it in good faith. Thus, M, when drunk, made a negotiable note that was bought by a bank for half its value. The bank was informed that it had been given for a patent hayfork, and required a guaranty for its payment. The bank was legally free from gross negligence in taking the note without making inquiry of the maker. Even gross negligence would not have defeated the bank's title without proof that it had taken it in bad faith, or with knowledge of the fraud.

26. "Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser."

"Where an instrument containing the words, 'I promise to pay' is signed by two or more persons they are deemed to be jointly and severally liable thereon.

"No person is liable on the instrument whose signature does not appear thereon, except as herein other-

[1] For example, it must not involve a crime that cannot be personally set-

wise expressly provided; but one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name."

"Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorised; but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.[1]

"A signature by 'procuration' operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent, in so signing, acted within the actual limits of his authority."

27. One of the chief characteristics of a negotiable instrument is the mode of transferring it. This can be done by indorsement, whereby the same rights of ownership are conferred on the new holders as were enjoyed by the other. Additional rights also are acquired, as the indorser becomes conditionally liable for its payment, unless he is relieved by agreement. When a note is indorsed and discounted by a bank or individual, the ownership is transferred, and the payee has no further interest therein.

"The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate

[1] "The signature of any party may be made by a duly authorised agent."

as a negotiation of the instrument. But where the instrument has been paid in part it may be indorsed as to the residue."

28. Although an indorsement imports a writing on the back of a note, this may be made on a separate paper, which is called an allonge. This may be done when the bill or note is full of names or has been mislaid, or is at another place at the time of making the indorsement.

"Where the name of a payee or indorsee is wrongly designated or misspelled he may indorse the instrument as therein described, adding, if he think fit, his proper signature."

29. An indorsement, generally, is in blank, or in full:

(*a*) A blank indorsement consists simply of the name of the holder of an instrument written across the back, thereby conferring on the indorsee the right of writing over the holder's name an order to pay the sum mentioned therein to the indorsee or to his order, or of writing any other contract of indorsement that is not contrary to usage.

(*b*) An indorsement in full is one which mentions the name of the person to whom, or to whose order, the money specified in the instrument is to be paid. Thus, a note indorsed "Pay to B or order," signed by A, bears an indorsement of this kind.

(*c*) An indorsement also may be conditional, by which the indorser directs payment to be made on the happening of a certain event.

(*d*) It may be absolute, whereby the indorser promises to pay without regard to the taking of the usual steps to obtain payment of the instrument.

(*e*) The indorsement may be qualified. For example, when he adds the words, "without recourse," he means that the holder cannot look to him for payment if the maker or other prior parties fail to pay it. The addition of these words, "without recourse," does not impair the negotiable character of the instrument.[1]

(*f*) And, finally, another kind of indorsement is known as restrictive, in which the action of the indorsee is restricted; for example, that he must not pay to B for the use of C.

30. Indorsements are not confined to the narrow formulas already given; they may be in other words. When departures occur questions may arise concerning their intent and effectiveness. Thus, a promissory note was indorsed, "For value received, I hereby assign, transfer and set over to B, all my right, title, interest and claim in the within note." This passed the legal title without destroying its negotiability. Nor is the negotiability of a note destroyed by affixing a seal to the indorsement, either by a corporation or an individual.[2]

31. Sometimes a note is indorsed, "without recourse." The effect of adding these words is to relieve the indorser from liability for the payment of the note should the maker or other parties not pay the same at maturity. Its negotiable character is not thereby affected.

32. By indorsing a note a new party is introduced, and the instrument is endowed with new qualities.

[1] Thorpe v. Windeman, 123 Wis., 149.
[2] See § 15.

The promisor becomes immediately liable to the indorsee, and the indorser undertakes to pay if the maker does not. Though the indorsement consists only of the indorser's name, or a direction to pay to the order of a specified person, the contract of the indorsement implies: first, that the instrument itself and the signatures thereon are genuine; second, that the indorser has a good title thereto; third, that he is competent to make a contract; fourth, that the maker is competent to bind himself to pay the instrument, and, on due presentation of it, will pay the same at maturity; and, fifth, that if, when it is duly presented, it is not paid by the maker, the indorser will, on proper notice of its non-payment, pay the same to the indorsee or other holder.[1]

33. With respect to an indorser's authority to indorse, something may be said. As a person cannot

[1] "Where a person, not otherwise a party to an instrument, places thereon his signature in blank, before delivery, he is liable as indorser in accordance with the following rules:

"If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

"Every person negotiating an instrument by delivery or by a qualified indorsement warrants: That the instrument is genuine and in all respects what it purports to be; that he has a good title to it; that all prior parties had capacity to contract; that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

"But when the negotiation is by delivery only the warranty extends in favour of no holder other than the immediate transferee.

"The provisions of subdivision 3 of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.

"Every indorser who indorses without qualification warrants to all subsequent holders in due course: The matters and things mentioned in subdivisions one, two, and three of the next preceding section; and, that the instrument is, at the time of his endorsement, valid and subsisting.

"And, in addition, he engages that, on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonoured and the necessary proceedings on dishonour be duly taken he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it."

repudiate the authority of his agent and enjoy the benefit of his act, so a company which has received the proceeds of a note indorsed by its secretary cannot deny his authority to make the indorsement. And an agent or party doing business for another, who takes notes, indorses and transfers them to his principal, may recover the amount from him whenever he is compelled to pay by reason of his indorsement. Thus, A sold timber to B for D, and, with his consent, took a note payable to his own order, which he indorsed and transferred to D. A, having been compelled to pay as an indorser, recovered the amount from D.

"The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that, from want of capacity, the corporation or infant may incur no liability thereon."

"Where an instrument is drawn or indorsed to a person as 'cashier,' or other fiscal officer of a bank or corporation, it is deemed, prima facie, to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer."

34. Two or more payees of a bill or note that is jointly indorsed by them do not thereby render themselves liable as partners, and their liability is equal regardless of the order of their indorsement.

35. An indorser who gives credit to a note or bill by his indorsement, whether he has received any

consideration for so doing or not, must make the paper good to any subsequent indorser who received it for value and in the ordinary course of business. In other words, he guarantees the genuineness of the prior indorsement. He cannot, therefore, when the note indorsed by him has not been paid, call on the holder to sue the maker, and, should he refuse, insist that he is thereby released. The indorser's duty is to pay the note and sue the maker himself.

36. The last indorser of a negotiable note who pays the amount to the holder may recover thereon against any prior indorser. But "as respects one another, indorsers are liable, prima facie, in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally."

37. "The holder may at any time strike out any indorsement which is not necessary to his title. The indorser, whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument."

38. "Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same; but he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable."

39. Sometimes a note is guaranteed as well as indorsed. The statute of frauds requires a guaranty to be in writing, but when a guarantor's promise in

effect is to pay his own debt, though that of a third person is incidentally guaranteed, it need not be in writing. The statute means the promise of one man for the debt of another. The common case of the holder of a third person's note that is transferred for value with a guaranty can be referred to this principle. The assignor guarantees in reality his own debt. But an indorsement of a note by one who is not a party thereto is not a sufficient writing in some states to satisfy the statute.

40. To hold an indorser he must be properly notified of the non-payment of the note; and whether this has been done is a question of fact. If he was not properly notified this defence will avail whenever it is clearly proved.

41. A great variety of defences may be successfully made by an indorser that will be briefly noticed. One of these is usury; another is the maker's discharge by the holder. Nor can he be held when he has paid the note; nor when its issue was unlawful; nor when it was non-negotiable; nor when his indorsement was procured by fraud. Another defence is duress. By statute "the title of a person who negotiates an instrument is defective, within the meaning of this act, when he obtained the instrument or any signature thereto by fraud, duress, or force, and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to fraud." Finally, an indorser may avail himself of any defence existing between the holder and the maker, or principal debtor.

This is evidently a just principle, for surely the holder has no more rights against an indorser than he has against the principal debtor. If, therefore, he could interpose some just claim as a partial or complete defence, the indorser should be permitted to avail himself of it. But ignorance of the law concerning the effect of an indorsement is no defence. Nor can an indorser discharge himself by showing the holder how he can collect his money of the maker.

42. Sometimes a note drawn in the usual form is indorsed by a third person before its delivery. Many of the courts have been puzzled to determine the liability of such an indorser. The highest legal tribunal has declared that "when a promissory note, made payable to a particular person or order, is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place."[1] By the Negotiable Instruments Law three rules have been established: (1) "If the instrument is payable to the order of a third person the indorser is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee."

43. Sometimes oral evidence has been admitted to show the intention of the indorser; but its admission

[1] Rey v. Simpson, 22 How., 241.

is now excluded in some of the states by statute. It is regarded as contrary to public policy to permit an indorsement to be explained or varied in any manner by such evidence, except in cases of fraud, accident and mistake. Daniel asserts that evidence is almost universally admitted to show that such a party is a first indorser, and it would have been far better if the courts had generally presumed such to be the intention and established a rule that is clear, intelligible and certain in respect to so important a relation to commercial paper.

44. To fix the liability incurred by an indorser the holder must demand payment of the maker at the proper time and place, unless a reason exists for not doing so. For this purpose the holder, or a notary public, or some other person authorised by the holder, must call on the maker at his residence or place of business and present the paper and demand payment, and should he fail to pay, give immediate notice to the indorser, or put the notice in the post-office for transmission to him by the first mail, to the post-office most convenient or nearest to his residence.

45. The presentation must be made to the maker at his usual place of business during office hours, unless a reasonable excuse exists for not making it. A presentment through the post-office will not suffice. In ascertaining the maker's residence the date of the note creates the presumption that he resides at the place named therein, and inquiry should be made there.

46. In presenting the paper and demanding pay-

ment due diligence must be exercised, for if it is not, the indorser is discharged, even though the note was overdue when it was indorsed. What this is depends on circumstances, and in many cases on the time, mode and place of receiving paper, and on the relations of the parties between whom the question arises.

47. The questions of due diligence in the time of presentment and giving notice are said to be mixed ones for the judge and jury to decide. The judge must state the law to the jury, but they must determine the facts when they are disputed, and then the judge must decide whether they satisfy the law or not. When they are undisputed then the only question is to determine whether or not they are sufficient, which must be done solely by the judge.

48. In presenting checks for payment two rules must be observed: first, if the person who receives the check and the bank on which it is drawn are in the same place, the check must, in the absence of special circumstances, be presented the same day, or at latest, the day after it is received.[1] Second, if the person who receives the check and the bank on which it is drawn are in different places, in the absence of special circumstances, the check must be forwarded for presentment at the latest on the day after it is received. An agent to whom it is forwarded in like manner must present it at the latest on the day after receiving it.

49. In presenting notes and bills payable at a fixed

[1] In a few states a longer time for presentation has been fixed by statute.

date they must be presented to the maker or acceptor, or in his absence to his clerk or agent, at maturity; an earlier demand is worthless.

50. A bill of exchange payable at sight, or on demand, must be presented within a reasonable time. Payment of a note or bill payable on demand may be demanded as soon as it is signed; but the condition on which the indorser is liable is that payment shall be demanded within a reasonable time, and the earliest notice possible be given of the maker or drawee's refusal. On one occasion an eminent judge remarked, concerning a bill payable on demand, or at sight, that it was impossible to fix any precise time; payment must be demanded and notice given as soon as these things can conveniently be done, taking into view all the circumstances of the holder and drawer.

51. A bill of exchange payable at any time is payable immediately, and to charge the drawer or indorser it must be presented for payment in a reasonable time after receiving it. A delay of eight months, for example, is too long; and when the holder of a bill payable immediately has taken it from the payee, not in the usual course of business, but long after the reasonable and proper time for presentment, he is affected with notice of all the facts known by the payee at the time of the transfer.

52. The holder of a bill of exchange may present it for acceptance and have it protested should the drawer decline to accept it. In some states presentment for acceptance is not necessary of a bill payable at a fixed period after date. Again, in some states

the courts have held that while the holder of such a bill need not present the same for acceptance, a different rule applies to an agent to whom it has been sent for collection. There is no reason for applying a different rule to an agent and requiring that he should be more diligent than his principal, nor is this rule included in the new Negotiable Instruments Law.

53. "The acceptance of a bill is the signification by the drawee to the order of the drawer. The acceptance must be in writing, and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

54. "The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused may treat the bill as dishonoured."

55. "Where an acceptance is written on a paper other than the bill itself it does not bind the acceptor except in favour of a person to whom it is shown, and who, on the faith thereof, receives the bill for value."

56. "A bill may be accepted before it has been signed by the drawer or while otherwise incomplete, or when it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment. But when a bill, payable after sight, is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment."

57. "An unconditional promise in writing to accept a bill, before it is drawn, is deemed an actual acceptance in favour of every person who, upon the faith thereof, receives the bill for value.

"Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

58. "The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill, but the acceptance, if given, dates as of the day of presentation.

59. "An acceptance is either general or qualified. A general acceptance assents, without qualification, to the order of the drawer. A qualified acceptance, in express terms, varies the effect of the bill as drawn.

60. "An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere.

61. "An acceptance is qualified which is: Conditional — that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated. Partial — that is to say, an acceptance to pay part only of the amount for which the bill is drawn. Local — that is to say, an acceptance to pay only at a particular place. Qualified — as to time. The acceptance of some one or more of the drawees, but not of all.

62. "The holder may refuse to take a qualified

acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonoured by non-acceptance. Where a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorised the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notices of a qualified acceptance he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.

63. "Presentment for acceptance must be made: Where the bill is payable after sight or, in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument; or, where the bill expressly stipulates that it shall be presented for acceptance; or, where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

"In no other case is presentment for acceptance necessary in order to render any party to the bill liable.[1]

64. "Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour on a business day, and before the bill is overdue, to the drawer or some person authorised to accept or refuse acceptance on his behalf; and, where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless

[1] "Except as [above] provided, the holder of a bill which is required to be presented for acceptance, must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so the drawer and all indorsers are discharged."

one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

"Where the drawee is dead presentment may be made to his personal representative.

"Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or his trustee or assignee.

"When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon, on that day.

65. "Presentment for acceptance is excused,[1] and a bill may be treated as dishonoured by non-acceptance, in either of the following cases: Where after the exercise of reasonable diligence, presentment cannot be made; where the drawee is dead or has absconded, or is a fictitious person, or a person not having capacity to contract by bill; where, although presentment has been irregular, acceptance has been refused on some other ground."

66. A reasonable time must be allowed to demand payment of the maker of a note payable on demand that is indorsed after it becomes due. Nor is such a note regarded as overdue without some evidence that payment has been demanded and refused, even though it be several years old and no interest has been paid thereon.

[1] "Where the holder of a bill, drawn payable elsewhere than at the place of business or the residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance or presenting it for payment is excused, and does not discharge the drawers and indorsers."

67. The maker of a note payable generally has the whole of the business day on which it is due to pay it; but a note payable at a bank must be paid during banking hours; and when the holder is there until the close of the day, ready to receive payment, no further demand need be made to charge the indorser. But to demand of the maker of a note thus payable who has no funds there when it matures is unnecessary.

68. "When the day of maturity falls upon Sunday or a holiday the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon, on Saturday, when that entire day is not a holiday."

"Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment." In many statutes every negotiable instrument is payable at the time fixed therein, without grace, and this is the Negotiable Instruments Law.

69. Paper need not be presented for payment whenever this would be useless. The occasions that justify the holder in not doing this will now be described. When the maker has absconded the law does not require further inquiry; but this rule cannot be applied to a maker who has merely removed from his place of residence. Whenever the drawer admits

or acknowledges his liability to pay the bill he has drawn, the necessity of proving a demand of the drawee and of his refusal and notice does not exist. And the proof may consist of an express promise to pay or of other circumstances from which this may be inferred, as a part payment before, or after, the bill or check became due. Likewise, an acknowledgment of liability and promise to pay by the indorser after a default of payment by the maker dispenses with proof of presentment and notice, and throws on the indorser the double burden of negligence in this regard and that he was ignorant of it. His liability also continues whenever he waives notice of the protest. Thus, an indorser on the day when a note became due indorsed thereon a written waiver of notice and protest for non-payment, and on the same day a demand was made at the banking-house at which the note was payable, and the answer was that the maker had no money there. This was regarded as a sufficient demand. The death, bankruptcy or imprisonment of the maker constitutes no excuse for making a demand, because many means may remain of paying through the assistance of friends and in other ways.[1]

[1] "Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence. Presentment for payment isdispensed with: where, after the exercise of reasonable diligence, presentment as required by this act cannot be made. Where the drawee is a fictitious person. By waiver of presentment, express or implied."

70. A demand, unless it is excused, or due diligence in trying to make a demand, must be proved in order to recover from the indorser. But in an action against the maker this is not requisite, for he is liable in any event.

71. Though an indorser's liability is conditional, the only thing to do to make his liability absolute is to demand payment of the maker at the specified place on the last day of the period for which the note was given, and to give due notice of non-payment to the indorser. For, as the contract requires the maker to pay at maturity, a strict regard of duty, which is the life of commercial law, authorises the indorser to presume, unless he has received a notice to the contrary, that the maker has paid his obligation.

72. The notice is authentic information from the proper source that the paper has not been paid, and its object is to enable the party notified to take measures to secure himself against parties liable to him. It need not be, though it always is, in writing. Any information coming from those whose duty it is to give notice will suffice.

73. The notice must be sent by the holder himself, or by someone who has a real interest in the instrument, for the notice must assert that the holder intends to stand on his legal rights and to resort to the indorser for payment. And a bank that receives a note for collection, or as a security only, must follow the usual course of business and give notice of non-payment to the indorser. But the holder may employ an agent to give notice for him, and very generally

this is done by a notary public. In some states, but not in all, this is a part of his official duty.

74. The holder need notify only his immediate indorser, or only the indorser whom he intends to hold. A very common practice is for the holder to notify his immediate indorser and to inclose the notices to him for the preceding indorsers, which he is expected to send to them in a similar manner. By doing this he fulfils his whole duty. He perfects his right to recover against all by properly notifying the last indorser. Another and very common practice is for the holder to give a direct notice to each indorser, and if it would ordinarily be received as soon as it would by regular transmission through all the parties, it is sufficient. In most cases doubtless the notice thus sent is received earlier.

"Where a party has added an address to his signature, notice of dishonour must be sent to that address; but if he has not given such address then the notice of dishonour must be sent as follows:

"Either to the post-office nearest to his place of residence or to the post-office where he is accustomed to receive his letters; or, if he live in one place and have his place of business in another, notice may be sent to either place; or, if he is sojourning in another place, notice may be sent to the place where he is sojourning." [1]

75. The notary, who is generally employed, usually sends a notice to each indorser if he knows where to

[1] "But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section."

send it; very often not all their addresses are known. The practice is becoming more common of indicating on the instrument where the notice shall be sent, and this is desirable.

76. A notice of an indorsement by a partnership need not be sent to each member. Even after it has been dissolved a notice to one partner is sufficient to bind the other members. Persons who owe notes and bills jointly sometimes indorse them, and when they do they are not liable as partners. Consequently, a notice of the non-payment of such a bill to one will not discharge both. Each must have notice in order to be held for its payment.

77. Formerly in sending a notice the mail could be used in some cases, but not in all. When the person who was to be notified resided in the same city as the notifier, then the law required personal notice at his house, or place of business. It could not be deposited in the post-office. But a notice addressed to an indorser, deposited in the post-office of the city where both the notifier and indorser reside, is now regarded as proper by furnishing proof that it was received in time. In many states the legislatures have authorised the use of the mail for this purpose.

By the Negotiable Instruments Law the notice "may in all cases be given by delivering it personally or through the mails."

When the notice of dishonour of a note is duly addressed and deposited in the post-office the sender is deemed to have given due notice notwithstanding

any miscarriage of the mails.[1] Thus, an endorsed note contained no address. The notice of protest was mailed to the town where the note was dated, addressed to the indorser and to one signing the indorsement in the name of the indorser as her attorney. The note matured in October, the defendant's husband died in September. Before this she lived with him at the place to which the notice was sent. The mailing of the notice met the legal requirement.[2] In another case the testimony of a witness that he served notice on a corporation conducting a hotel by leaving the notice at the cashier's window did not show sufficient service, as the fact did not appear that the attention of anyone was drawn to the notice, and the president and manager testified that no such notice was brought to their attention.[3]

78. Many questions have arisen concerning the post-office to which the notice must be sent. The law does not imperatively require that the notice be sent to the post-office nearest to the residence of the indorser, for this cannot always be known without considerable inquiry, delay, and expense. In the absence of precise knowledge, a notice sent to the post-office at the county seat of a county, will suffice, for if the indorser lives at a place nearer to another post-office, at which he usually receives his letters, the postmaster will doubtless forward the notice to that office. Another rule has been established that

[1] State Bank v. Solomon, 84 N. Y. Supp., 976.

[2] J. H. Mahlman Co. v. McKane, 60 N. Y., App. Div., 546.

[3] American Ex. Nat. Bank v. American Hotel Victoria Co., 103 N. Y., App. Div., 372.

is reasonable and in most cases can be easily applied. A notice may be sent either to the post-office nearest to the indorser's residence, or to the one at which his mail communications are usually received.

79. "Where the person giving, and the person to receive notice resides in the same place, notice must be given within the following times: If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following. If given at his residence it must be given before the usual hours of rest on the day following. If sent by mail it must be deposited in the post-office in time to reach him in usual course on the day following.

"Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times: If sent by mail it must be deposited in the post-office in time to go by mail the day following the day of dishonour, or, if there be no mail at a convenient hour on that day, by the next mail thereafter. If given otherwise than through the post-office, then within the time that notice would have been received, in due course of mail, if it had been deposited in the post-office within the time specified in the last sub-division." [1]

80. A notice sent on Sunday is invalid, and an indorser who should receive it would not be bound, nor would the irregularity in the service be regarded as waived.

[1] "Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department."

81. A holder is not responsible for the receipt of a notice by the indorser to the indorser. When the notice is properly prepared, directed and sent within the specified time to the indorser, the holder has performed his whole duty.[1] He is not an insurer for its safe and regular transmission.

82. There are occasions when notices need not be given. The first that may be mentioned is war, which stops the usual communication between the parties. Thus, the seizing of mails between Pittsburg and New Orleans during the Civil War was a valid excuse for omitting to send a notice of the dishonour of a bill. The insolvency of the maker does not dispense with the necessity of demand and notice of non-payment.

83. There must be due diligence in notifying, otherwise the indorser is discharged. What this is depends on circumstances which must be ascertained, when they are disputed, by the jury. Two general rules have been established for determining the time. If the person to be notified lives in the same town as the notifier, the notice must be given by the close of the next day after it is received. Therefore, a delay to send notice of the non-payment of a note on Friday until the next Monday would be too long. If the parties live in different places the notice must be sent by the next practicable mail on the morning of the day after making the demand. Should the mail close at so early an hour that it is impracticable

[1] This rule does not cover the cases in which the mail is substituted for personal notice. In these it must be shown that the notice was received, unless a statute establishes a different rule.

to forward a letter, one sent by the next mail will be in time.

84. The time established for an indorser to notify his prior indorser is an entire day; and an agent for collection, who has indorsed a note or other instrument, must receive and give notice like any other indorser.

85. Sometimes a mistake is made in dating a notice. Is the indorser then relieved? The law is very strict. If the demand was made on the proper day and the indorser is notified that the demand was duly made, though the notice was dated the day afterward, the indorser will be held; but if the date of the notice sent to the indorser without any explanation shows that the notice was sent too early, he is relieved. The principle governing such cases seems to be that the indorser obtains his information from the notice. If this shows that the demand was too late he is relieved; if it was too early he presumes that the mistake will be discovered and followed by a new demand, and if it is not he is relieved. But if the demand is made on the right day, ought not the holder be permitted to show this and hold the indorser, unless he can show that he was injured by the mistake?

86. This much concerning notice. A few words may be said concerning the protest. The object of this is to have proof of the presentment and demand for payment, and that the parties to the instrument were duly notified. Protests generally pertain to foreign bills of exchange and must be made only of them. As this is an easy and cheap method of furnishing evidence of these matters, the practice has

become very general of protesting inland bills and notes that are not duly paid. Indeed, the custom to treat inland bills and notes in the same manner as foreign bills has become so universal that in common parlance the terms mean the taking of such steps as are required to charge the indorser. For the same reason the word protest, sometimes employed in giving notice of dishonour to the indorsers of inland bills and notes, clearly implies a demand, non-payment and consequent dishonour of a bill or note in all cases in which a protest is necessary.

87. A notary is sometimes disqualified from acting. If he is a shareholder in a bank, or a director, cashier, teller, clerk or other officer of the institution, he is forbidden from exercising the duties of a notary in some states. In others he is permitted to do so either by the common law or by statute.

88. In some states, but not all, the sending of notice is an official duty of a notary. The notice may be sent by the holder, but if a notary public is employed to make presentment, his employment includes the notifying of the indorser. And when the notice is duly certified and is not contradicted or questioned, it is presumed to be legal.

89. A notary who receives an instrument to be presented and protested must put him in possession of the proper intelligence for performing his duty. The notary must first make a demand on the party primarily liable at his place of business within business hours. He must then give notice of the presentment and non-payment to the indorser.

90. What is a proper presentment and demand by a notary? Should he follow the usage, no more can be expected of him. For example, he is not required to go beyond the limits of a state in making a demand unless this is the usage. Notes are often made payable at a bank, and when they are their presentment is sufficient if they are actually there at the proper time to be delivered to anyone rightfully entitled to them by paying whatever may be legally due.

91. A visit to the maker's place of business during business hours for the purpose of making a presentment, and which is closed, is equivalent to an actual presentment and demand. But a demand by a notary in the street of an acceptor of a bill is not a sufficient demand. It should be made at his place of business.

92. A demand and notice of the non-payment of a negotiable note may be waived on or before the day of maturity by the indorser, either orally or in writing, or by acts having the effect to mislead the holder and prevent him from treating the note as he would otherwise have done. Having waived this right, an indorser is put in the same position as if the protest had been made and a notice had been duly given to him. A drawer who promises to pay a bill, after full knowledge of the fact of an omission to make due presentment, thereby waives it and becomes bound. The words, "protest waived," are regarded everywhere as a waiver of both demand and notice. In one of the cases the court remarked that a waiver of protest before

the maturity of a note is a waiver of all the steps leading to it and includes demand and notice of non-payment.

93. The transfer of paper by indorsement after maturity has not the same significance as a previous transfer. By such a transfer the indorser simply conveys his interest in the note or other instrument, and the indorsee takes it subject to the same defence as might have been made by the maker had it remained in the payee's possession. The reason is that its non-payment is a fact of so much importance that he should inquire why it had not been paid.

94. The indorsee takes such a note on the credit of the indorser, who is liable only on proof that a demand has been made of the maker within a reasonable time, and immediate notice has been given of the default. He is as much entitled to a notice of demand and non-payment as an indorser before its maturity.

95. Promissory notes originate in two ways: they are issued either in payment of merchandise or other property, or for the purpose of borrowing money on them. Those which have their origin in business transactions are called business or commercial paper; the other kind of note is known as accommodation paper. This is made by an agreement between the maker and payee, who is also the indorser, for the benefit of one of them.

96. The maker's promise or undertaking is to pay his note to any holder at maturity. He is liable,

except to the payee, like the maker of any other paper. The indorser promises, in effect, that if the maker does not pay his note at maturity he will do so as soon as he has received due notice of the maker's failure to fulfil his promise. Very frequently accommodation notes are made for the indorser's benefit, and when they are he must pay them. In other cases, as the maker has received the proceeds, he is responsible therefor, and the indorser can recover from him whenever he has been obliged to pay them.

97. As accommodation paper is made for the purpose of borrowing money, it must necessarily pass into the possession of a third party. The indorsee acquires as good title, and his rights in every respect are as perfect as those of the indorsee of commercial paper. The maker, therefore, cannot successfully defend against the indorsee that he is not the owner, and gave no consideration therefor, or that he knew its real character. The indorsee is no more required to prove a consideration than in other cases.

98. An accommodation note given to a party for his use, without any restriction, can be pledged as security for a debt, and the maker is cut off as completely from making defences against the person to whom it has been pledged as the maker of ordinary business paper is against the indorsee. Said an eminent jurist: "He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend must abide the consequence, and has no more right to complain if his friend accommodates

himself by pledging it for an old debt than if he had used it in any other way."[1]

Negotiable Instruments Law

The following sections of the law have not been incorporated in the foregoing chapter. These sections correspond with the law of New York, Pennsylvania and other states.

6. Matter not affecting a negotiable instrument.
10. Any word can be used.
15. Delivery of incomplete instrument.
17. Rules of construction that apply to ambiguous note.
23. Forged note.
30. When is an instrument negotiated.
31. How the indorsement must be written.
33. Kinds of indorsement.
34. Special indorsement.
35. Conversion of blank into special indorsement.
36. Restrictive indorsement.
37. Rights conferred by restrictive indorsement.
38. Qualified indorsement.
39. Conditional indorsement.
40. Negotiation by delivery of instrument payable to bearer specially indorsed.
41. Indorsement by two payees not partners.
44. Indorsement by representative.
45. Date of negotiation by indorsement.
46. Indorsement where made.
47. How long negotiable instruments may be negotiated.
49. Transfer of instrument payable to order of holder without his indorsement.
51. Holder may sue in his own name.
52. Who is a holder in due course.
53, 54. Who is not a holder in due course.
56. Such holder must have actual knowledge of infirmity.
57. Holder in due course can enforce payment against all parties.
58. Any other holder cannot.
59. Every holder is prima facie holder in due course.
60. Engagement of maker.

[1] An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

61. Engagement of drawer.
62. Engagement of acceptor.
63. A person who does not sign as maker, drawer, or acceptor is indorser.
67. Indorsement of instrument negotiable by delivery.
69. Negotiation by broker or other agent of instrument without indorsement.
70. Presentment for payment is not necessary to hold person primarily liable.
71. Presentment must be made on day instrument falls due.
72. What is sufficient presentation.
73. Place of presentation.
74. Mode of presentation.
75. Presentment of instrument payable at bank.
76. Presentment when person primarily liable is dead.
77. Presentment to partnership.
78. Presentment to several persons not partners.
83, 84. When is instrument dishonoured.
88. Where is payment made in due course.
89, 97, 98, 99, 101. To whom notice of dishonour must be given.
90, 91, 94. By whom notice may be given.
92, 93. To whom benefit of notice enures.
102. When notice must be given.
105. Notice duly addressed and deposited in post-office is due notice.
107. Time for party to give notice to antecedent party.
109–111. Waiver of notice.
112. When notice is dispensed with.
113. When delay in giving is excused.
114, 115. When notice is not required.
116. When notice of dishonour of non-acceptance has been given, notice of non-payment need not be.
117. Effect of omitting to give notice of non-acceptance.
118. Protest is required only of foreign bills of exchange.
119. Discharge by primary debtor.
120. Discharge by secondary debtor.
121. Discharge by second party remits him to rights of prior parties.
122. Renunciation of rights by holder.
123. Cancellation unintentional or by mistake.
124, 125. Effect of alteration.
127. A bill of exchange does not operate as an assignment of funds in drawee's possession.
138. How bill may be addressed.
129. Distinction between inland and foreign bills.

130. How bill may be regarded when drawer and drawee are same person.
131. Referee in case of dishonoured bill.
149. When a bill is dishonoured by non-acceptance.
152. Protest of foreign bills.
153. Protest must be annexed to the bill.
154. Who may make protest.
155. When it must be made.
156. Where it must be protested.
157. A bill protested for non-acceptance can be protested for non-payment.
158. Protest of bill accepted by insolvent acceptor.
159. When protest may be dispensed with.
160. Protest of bill lost or detained.
161. Acceptance for honour.
162. Must be in writing.
163. For whose honour is an acceptance made.
164. To whom acceptor for honour is liable.
165. Nature of his engagement.
166. Acceptance of bill payable after sight.
167. When protest of dishonoured bill accepted for honour must be protested.
168. How presentment for payment to acceptor for honour must be made.
170. Protest of bill not paid by acceptor for honour.
171. Who may pay a bill protested for honour.
172. How such payment must be made.
173, 174. Payment by two or more persons for honour of different parties.
175. Effect of paying bill for honour and rights of those who pay.
176. Recourse of holder who refuses to receive payment.
177. Payor for honour is entitled to receive the bill.
178–183. Bills in a set.

SEC. 6. The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or,

2. Does not specify the value given, or that any value has been given therefor; or,

3. Does not specify the place where it is drawn or the place where it is payable; or,

4. Bears a seal; or,

5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

SEC. 10. The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

SEC. 15. Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon, before delivery.

SEC. 17. Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated it will be considered to be dated as of the time it was issued.

4. Where there is a conflict between the written and

printed provisions of the instrument the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either, at his election.

SEC. 23. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

SEC. 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder, completed by delivery.

SEC. 31. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

SEC. 33. An indorsement may be either special or in blank, and it may also be either restrictive or qualified or conditional.

SEC. 34. A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable, and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An

indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery.

SEC. 35. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

SEC. 36. An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or,

2. Constitutes the indorsee the agent of the indorser; or,

3. Vests the title in the indorsee in trust for, or to the use of, some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

SEC. 37. A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;

2. To bring any action thereon that the indorser could bring;

3. To transfer his right as such indorsee, where the form of the indorsement authorises him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

SEC. 38. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

SEC. 39. Where an indorsement is conditional a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument, so indorsed, is negotiated will hold the same or the proceeds thereof subject to the rights of the person indorsing conditionally.

SEC. 40. Where an instrument payable to bearer is indorsed specially it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

SEC. 41. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the other.

SEC. 44. Where any person is under obligation to indorse in a representative capacity he may indorse in such terms as to negative personal liability.

SEC. 45. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed, prima facie, to have been effected before the instrument was overdue.

SEC. 46. Except where the contrary appears, every indorsement is presumed, prima facie, to have been made at the place where the instrument is dated.

SEC. 47. An instrument, negotiable in its origin, continues to be negotiable until it has been restrictively indorsed, or discharged by payment or otherwise.

SEC. 49. Where the holder of an instrument, pay-

able to his order, transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein; and the transferee acquires, in addition, the right to have the indorsement of the transferer; but for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

SEC. 51. The holder of a negotiable instrument may sue thereon in his own name; the payment to him in due course discharges the instrument.

SEC. 52. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face.

2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact.

3. That he took it in good faith and for value.

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

SEC. 53. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

SEC. 54. Where the transferee receives notice of any infirmity in the instrument, or defect in the title of the person negotiating the same, before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

Who is a holder in due course? This question has arisen more frequently than any other in administering the Negotiable Instruments Law. On one occasion the drawer of a check gave it to another to be delivered to a third party in payment of the drawer's debt, but he fraudulently handed it to the payee in payment of a debt due from himself. The payee accepted it in good faith in payment of the debt. He was therefore regarded as a bona fide purchaser for value, and the drawer could not set up the fraud in defense of the check, nor maintain an action against him to recover it.[1] In another case a person purchased a note for $1,000 three months before maturity knowing the maker to be solvent, for $500 without knowledge of any infirmity. He was entitled to recover thereon, though the consideration from the payee to the maker had failed.[2] In another case a note had been indorsed by the payee to another and by three successive holders before it was acquired by the plaintiff. The indorser to the plaintiff was a bona fide holder of the note and transferred it for value after maturity. The defence of fraud though available as between the original parties could not avail against the plaintiff.[3]

On the other hand when one received a check from his brother, without consideration, to be used to bind a bargain and which was to be void if the bargain failed, and a person received it after notice of the

[1] Boston Steel & Iron Co. v. Steurer, 183 Mass., 140.
[2] McNamara v. Jose, 28 Wash., 461.
[3] Jennings v. Carlucci, 87 N. Y. Supp., 475.

failure of the bargain, and payment had been stopped, the payee was not a holder in due course.[1]

SEC. 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such fact that his action in taking the instrument amounted to bad faith.

In construing this section the person to whom a note is negotiated must have actual knowledge of the infirmity, or knowledge of such facts that his action in taking the instrument amounts to bad faith; one therefore who has knowledge of a defect in his transferrer's title, or knowledge of such facts that his action in taking the instrument amounts to bad faith, is not a holder in due course.[2] Again, mere suspicion of a defect in the title, or knowledge of circumstances that would excite such suspicion in the mind of a prudent man, or gross negligence of the taker at the time of the transfer, or an indorsement thereon describing the receipt of money from one of the makers who, released from further payment, would not defeat the assignee's title.[3]

On another occasion two certificates of deposit were drawn payable, one to "C, trustee," and the other to "C, trustee of B. F." At the time they were wrongfully indorsed by the trustee in the same form one of them had almost twelve months, and the other six months to run before maturity. They gave actual

[1] M. Grok's Sons v. Schneider, 34 N. Y. Misc., 195.
[2] Keene v. Behan, 40 Wash., 505.
Valley Sav. Bank v. Mercer, 97 Md., 458.

notice, so the court held, to the indorsee, that they represented a trust fund and obligated him to inquire into the right of the trustee to dispose of them.[1]

SEC. 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

SEC. 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defences as if it were non-negotiable; but a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

SEC. 59. Every holder is deemed, prima facie, to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favour of a party who became bound on the instrument prior to the acquisition of such defective title.

SEC. 60. The maker of a negotiable instrument, by making it, engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

[1] Ford v. H. C. Brown & Co., 114 Tenn., 467.

SEC. 61. The drawer, by drawing this instrument, admits the existence of the payee, and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that, if it be dishonoured, and the necessary proceedings or dishonour be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

SEC. 62. The acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance, and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and,

2. The existence of the payee and his then capacity to indorse.

SEC. 63. A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

In construing this section one who signs his name on the back of a note prior to delivery is an indorser.[1] And the fact that persons signing their names in blank on the note of a corporation were respectively president and secretary, and as such executed it on its behalf, did not enlarge their individual liability, which

[1] Bank of Montpelier v. Montpelier Lumber Co., 102 Pac., 685.

was that of indorser only, who could not be held on presentment, demand and notice of non-payment by the owner.[1]

SEC. 67. Where a person places his endorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

SEC. 69. Where a broker or other agent negotiates an instrument without indorsement he incurs all the liabilities prescribed by section sixty-five of this act unless he discloses the name of the principal and the fact he is acting only as agent.

SEC. 70. Presentment is not necessary in order to charge the person primarily liable on the instrument, but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

SEC. 71. Where the instrument is not payable on demand presentment must be made on the day it falls due. Where it is payable on demand presentment must be made within a reasonable time after its issue, except that, in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

What is a reasonable time within this section? In answering this question regard must be had to the nature of the instrument, the usage of trade, and the

[1] Luckenbach v. McDonald, 95 C. C. A., 604.

facts of the particular case. A demand note was indorsed without consideration for the maker's accommodation and its payment was secured by the deposit of securities. Two years afterward the plaintiff complained to the indorser of its non-payment and twice annually wrote that the maker had not paid the interest. No steps, however, were taken to charge the indorser by presentment of the note for payment until more than three and a half years had elapsed. The presentment was not within a reasonable time.[1] Again, if a series of notes are made payable at different times under an agreement making those maturing later due immediately on default in payment of the one first due, the holders of the former have a reasonable time to present them for payment after the dishonour of the first one.[2] A note also payable to the order of the maker on demand after date at a bank designated is a note payable on demand and must be presented for payment within a reasonable time after its issue.[3]

SEC. 72. Presentment for payment to be sufficient must be made:

1. By the holder or by some person authorised to receive payment on his behalf.

2. At a reasonable hour on a business day.

3. At a proper place, as herein defined.

4. To the person primarily liable on the instrument or if he is absent or inaccessible, to any person found at the place where the presentment is made.

[1] Commercial Nat. Bank v. Zimmerman, 185 N. Y., 210.
[2] Creteau v. Foote & Thorne Glen Co., 40 N. Y. App. Div., 215.
[3] Schlesinger v. Schultz, 110 N. Y. App. Div., 356.

SEC. 73. Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented.

2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument, and it is there presented.

3. Where no place of payment is specified, and no address is given, and the instrument is presented at the usual place of business or residence of the person to make payment.

4. In any other case, if presented to the person to make payment, wherever he can be found, or if presented at his last known place of business or residence.

SEC. 74. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

SEC. 75. Where the instrument is payable at a bank presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

SEC. 76. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found.

Notwithstanding the death of the maker, notice of dishonour must be given to the indorser.[1]

SEC. 77. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

SEC. 78. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

SEC. 83. The instrument is dishonoured by non-payment when:

1. It is duly presented for payment, and payment is refused or cannot be obtained; or,

2. Presentment is excused and the instrument is overdue and unpaid.

SEC. 84. Subject to the provisions of this act, when the instrument is dishonoured by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

SEC. 88. Payment is made in due course when it is made at or after the maturity of the instrument, to the holder thereof, in good faith, and without notice that his title is defective.

SEC. 89. Except as herein otherwise provided, when a negotiable instrument has been dishonoured by non-acceptance or non-payment, notice of dishonour must be given to the drawer and to each indorser, and any

[1] Reed, v. Spear, 107 N. Y., App. Div., 144.

drawer or indorser to whom such notice is not given is discharged.

SEC. 90. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who upon taking it up would have a right to reimbursement from the party to whom the notice is given.

SEC. 91. Notice of dishonour may be given by an agent, either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

SEC. 92. Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

SEC. 93. Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom such notice is given.

SEC. 94. Where the instrument has been dishonoured in the hands of an agent, he may either himself give notice to the parties liable thereon or he may give notice to his principal. If he gives notice to his principal he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice himself, the same time for giving notice as if the agent had been an independent holder.

SEC. 102. Notice may be given as soon as the instrument is dishonoured, and unless delay is excused,

as hereinafter provided, must be given within the times fixed by this act.

SEC. 105. Where notice of dishonour is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

SEC. 109. Notice of dishonour may be waived, either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied.

This section of the law has been applied in the following case: The defendant, who was one of the payees and accommodation indorsers on a note, indorsed another note "for renewal" and mailed it to the maker before maturity of the first note. The maker inserted his name in place of the name of one of the payees and, after the maturity of the first note, took it up by discounting the second one. The discounting bank had no notice until the time of the discount that the defendant had indorsed the second note. The indorsement by the defendant before the maturity of the first note did not amount to a waiver of notice of dishonour of the first note.[1]

SEC. 110. Where the waiver is embodied in the instrument itself it is binding upon all parties; but where it is written above the signature of an indorser it binds him only.

SEC. 111. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver, not only of a formal

[1] First National Bank v. Gridley, 112, N. Y. App. Div., 398.

protest, but also of presentment and notice of dishonour.

SEC. 112. Notice of dishonour is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties to be charged.

SEC. 113. Delay in giving notice of dishonour is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate notice must be given with reasonable diligence.

SEC. 114. Notice of dishonour is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person.

2. When the drawee is a fictitious person or a person not having capacity to contract.

3. When the drawer is the person to whom the instrument is presented for payment.

4. Where the drawer has no right to expect or require that the drawee or acceptor will honour the instrument.

5. Where the drawer has countermanded payment.

SEC. 115. Notice of dishonour is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument.

2. Where the indorser is the person to whom the instrument is presented for payment.

3. Where the instrument was made or accepted for his accommodation.

SEC. 116. Where the notice of dishonour by non-acceptance has been given, notice of a subsequent dishonour by non-payment is not necessary, unless in the meantime the instrument has been accepted.

SEC. 117. An omission to give notice of dishonour by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

SEC. 118. Where any negotiable instrument has been dishonoured it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.

SEC. 119. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor.

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.

3. By the intentional cancellation thereof by the holder.

4. By any other act which will discharge a simple contract for the payment of money.

5. When the principal debtor becomes the holder of the instrument, at or after maturity, in his own right.

SEC. 120. A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument.

2. By the intentional cancellation of his signature by the holder.

3. By the discharge of a prior party.

4. By a valid tender of payment made by a prior party.

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.

6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

SEC. 121. Where the instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and,

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

SEC. 122. The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor, made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

SEC. 123. A cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative; but where an instrument or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority.

SEC. 124. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorised or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered, and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor.

SEC. 125. Any alteration which changes:

1. The date.

2. The sum payable either for principal or interest.

3. The time or place of payment.

4. The number or the relations of the parties.

5. The medium or currency in which payment is to be made.

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

SEC. 127. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is

not liable on the bill unless and until he accepts the same.

SEC. 128. A bill may be addressed to two or more drawees jointly, whether they are partners or not, but not to two or more drawees in the alternative or in succession.

SEC. 129. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within the state. Any other bill is a foreign bill.

SEC. 130. Where, in a bill, drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

SEC. 131. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need — that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

SEC. 149. A bill is dishonoured by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or,

2. When presentment for acceptance is excused, and the bill is not accepted.

SEC. 150. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dis-

honoured by non-acceptance, or he loses the right of recourse against the drawer and indorsers.

SEC. 151. When a bill is dishonoured by non-acceptance an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary.

SEC. 152. Where a foreign bill, appearing on its face to be such, is dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not previously been dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it is not so protested the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonour is unnecessary.

SEC. 153. The protest must be annexed to the bill or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment.

2. The fact that presentment was made, and the manner thereof.

3. The cause or reason for protesting the bill.

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

SEC. 154. Protest may be made by:

1. A notary public; or,

2. By any respectable resident of the place where the bill is dishonoured, in the presence of two or more credible witnesses.

Sec. 155. When a bill is protested such protest must be made on the day of its dishonour, unless delay is excused as herein provided. When a bill has been duly noted the protest may be subsequently extended as of the date of the noting.

Sec. 156. A bill must be protested at the place where it is dishonoured, except that when a bill, drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

Sec. 157. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

Sec. 158. Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

Sec. 159. Protest is dispensed with by any circumstances which would dispense with notice of dishonour. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

Sec. 160. When a bill is lost or destroyed, or is wrongly detained from the person entitled to hold

it, protest may be made on a copy or written particulars thereof.

SEC. 161. Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill, *supra* protest for the honour of any party liable thereon, or for the honour of any person for whose account the bill is drawn. The acceptance for honour may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honour for one party there may be a further acceptance by a different person for the honour of another party.

SEC. 162. An acceptance for honour, *supra* protest, must be in writing, and indicate that it is an acceptance for honour, and must be signed by the acceptor for honour.

SEC. 163. Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

SEC. 164. The acceptor for honour is liable to the holder, and to all parties to the bill subsequent to the party for whose honour he has accepted.

SEC. 165. The acceptor for honour, by such acceptance engages that he will, on due presentment, pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee; and provided also, that it shall have been duly presented for payment

and protested for non-payment, and notice of dishonour given to him.

SEC. 166. Where a bill, payable after sight, is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

SEC. 167. Where a dishonoured bill has been accepted for honour, *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour or referee in case of need.

SEC. 168. Presentment for payment to the acceptor for honour must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four.

SEC. 169. The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honour or referee in case of need.

SEC. 170. When the bill is dishonoured by the acceptor for honour it must be protested for non-payment by him.

SEC. 171. Where a bill has been protested for non-payment, any person may intervene and pay it, *supra* protest, for the honour of any person liable thereon or for the honour of the person for whose account it was drawn.

SEC. 172. The payment for honour, *supra* protest, in order to operate as such, and not as a mere voluntary payment, must be attested by a notarial act of honour, which may be appended to the protest or form an extension to it.

SEC. 173. The notarial act of honour must be founded on a declaration made by the payor for honour or by his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

SEC. 174. Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

SEC. 175. Where a bill has been paid for honour all parties subsequent to the party for whose honour it is paid are discharged, but the payor for honour is subrogated for, and succeeds to both the rights and duties of the holder, as regards the party for whose honour he pays, and all parties liable to the latter.

SEC. 176. Where the holder of a bill refuses to receive payment, *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment.

SEC. 177. The payor for honour on paying to the holder the amount of the bill, and the notarial expenses incidental to its dishonour, is entitled to receive both the bill itself and the protest.

SEC. 178. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

SEC. 179. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

SEC. 180. Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

SEC. 181. The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part, as if it were a separate bill.

SEC. 182. When the acceptor of a bill, drawn in a set, pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

SEC. 183. Except as herein otherwise provided, where any one part of a bill, drawn in a set, is discharged by payment or otherwise, the whole bill is discharged.

§ 5. CONTRACT BETWEEN BANK AND DEPOSITOR; CHECKS

1. How a check should be signed.

2. Who, acting as a representative, can sign them.
3. The law presumes a check is given in payment of a debt.
4. When the giving of a check does not transfer a deposit the holder cannot sue the drawee for the amount.
5. Cases in which a check does transfer a deposit.
6. A drawer may stop payment of his check.
7. Drawer's death works a revocation.
8. Check is designed for immediate presentation.
9. It is not due until payment is demanded.
10. Drawee may refuse to pay if deposit is insufficient.
11. If drawer has no money the drawing of check is a fraud.
12. A bank cannot permit an agent to use his principal's money to discharge his own indebtedness.
13. A public deposit belongs to the proper official.
14. A bank is responsible to depositor for paying forged checks.
15. Nor can it recover the money from an innocent holder.
16. Payment on a forged indorsement does not prevent recovery by rightful owner.
17. Protest of checks on non-payment.
18. Consequences of not presenting a check in proper time for payment.
19. A check may be certified.
20. What this implies.
21. Cashier's authority to certify.
22. Certification of forged check.
23. Certification of insolvent drawer.

24. Effect of inquiry about certification.
25. Post-dated check.
26. Right to return checks by clearing-house banks.

1. As checks are the most common of all instruments in commercial business, some principles will be added to those contained in the previous chapter. Like every other instrument, a check must be properly signed. A check signed by an individual with the word, "Agent," "Treas.," or other descriptive term has sometimes been regarded as his individual check. By the modern law the intention of the signer is the guiding star. If, therefore, this is his way of signing checks for his principal, the courts will give due effect to his intention. When the mode of signing is ambiguous it may be shown by oral evidence whether the signer intended to bind himself or his principal, or company.

2. Again, who, acting in a representative capacity, can give checks? The president of a company is not authorised by virtue of his office to draw corporation checks; but authority may be granted him by charter, statute or usage. Nor can a partnership deposit be drawn on the check of an individual partner. But if it should be thus drawn and applied to the use of the partnership, such action would afford protection to the partnership. Either of two executors or administrators can sign a check, but all who act as trustees must sign. A court of equity, though, should one of them abscond, could order a bank to pay a check drawn by the other trustee.

3. The law presumes that a check is given in payment of a debt or for cash, and is evidence of the fact whenever the drawer had funds in the drawee's possession. The law presumes that checks taken by a creditor from his debtor, which he has received from another, are accepted as conditional payment, and not as a satisfaction of the debt. And this presumption can be overthrown only by clearly showing that they were accepted as cash, or that an agreement existed to receive them as unconditional payment.

4. In nearly every state a bank on which a check is drawn is under no legal obligation *to the holder* to pay or accept it, whether the maker's funds are sufficient for this purpose or not. In four or five states the effect of giving of a check to a person is to transfer to him the amount of the maker's deposit therein specified, and the check holder can sue the bank for the amount whenever payment is declined. In all other states the holder of a check cannot recover from the bank on which it is drawn, before acceptance. In like manner the Negotiable Instruments Law provides that "a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." A bank should not delay long either to pay, or to accept, or to refuse payment. It is not right to keep a check for several days and then refuse to pay.

While this is the most general rule existing between banks and check holders, these institutions have well defined duties to perform for their customers, the

drawers. Their orders must be observed; and if a bank should decline to pay a check drawn on a sufficient fund belonging to one of its depositors, without a justifiable reason for so doing, the institution would be liable for whatever injury the depositor sustained. For example, should a bank decline to pay a check supposing that the maker's deposit was insufficient, when in truth it was ample, the institution would be liable for the consequences of dishonouring his order, even though its conduct was founded on the mistaken calculation of a bookkeeper.

5. Though a check drawn in the ordinary form transfers no title to a bank deposit, it does effect a transfer whenever it is drawn for the whole amount due to the depositor. Then, indeed, the legal title is completely transferred on the delivery of the check even against the drawer, but if only a part is included in an order it will not have that effect unless it is accepted by the drawee. The reason is technical for this distinction which, indeed, does not everywhere exist.

6. A drawer may stop the payment of his check. This is usually done by giving a notice to the bank on which the check is drawn. After receiving such a notice it can pay only at its peril.

7. The drawer's death works a revocation of his check, notwithstanding, should a bank pay his check afterward, without knowing of his end, the payment would be legal. Of course, in the states where a check operates as an assignment of the maker's deposit, his death is without any significance.

8. A check is designed for immediate presentation.

The holder, therefore, should present it for payment as soon as he reasonably can, and if he does not the retention is at his own risk. The Negotiable Instruments Law declares that "a check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by delay." Delay in presentation, however, does not discharge the drawer unless he has been injured. The rules established for making presentation should be observed; for where they are not the risk of the drawee's solvency is assumed by the payee.[1]

9. A check is not considered due until payment is demanded, and in this regard differs from a bill of exchange or note, which is payable on a particular day. Consequently, the receiving of a check a few days after its date from the payee does not, like the receiving of an overdue bill, subject the holder to the objections that might have been raised by the drawer against the payee. A delay of two or three days is not enough to put the receiver on inquiry concerning the consideration for which the check was given, nor subject him to defences that might exist between the drawer and payee. Yet a check may be retained so long after its date without presentation as to cast discredit thereon; and when a check is presented for payment in a discredited condition the drawee bank should not pay it, and if it does the check cannot be charged to the depositor's account. Again, as an overdue check is taken on the credit of the indorser, it is subject to

[1] For more precise rules concerning presentation see Sec. 5, § 48.

the equities or defences that existed between the original parties.

10. A bank may refuse to pay a check of a customer whose deposit is insufficient to pay the full amount. In other words, the presenter cannot claim whatever there may be and retain his check for the balance. But if he is willing to surrender the check there is no reason why a bank should not pay him all it has belonging to the depositor. A bank that pays a check to a holder who has committed no fraud in presenting it, though the deposit was insufficient, cannot recover the amount from him, but must look to the drawer.

11. The drawing of a check on a bank in which the drawer has no funds is a fraud, both on the person to whom it is given and on the bank. And the holder is also guilty of fraud should he present it for payment, knowing the condition of the drawer's account.

12. A bank cannot knowingly permit an agent or trustee to use trust money to discharge his individual indebtedness, and ought to refuse to honour his check diverting the trust money. Nor should it permit him to transfer trust money to his own account, for this is often a fatal step to its further misuse.

13. A deposit by a public officer belongs to his successor on his accession to office. A bank may withhold payment from rival officials or boards that claim the deposit, until the question is legally determined in an action brought by the bank or by the officials.

14. As a bank is presumed to know the signatures of its depositors, it cannot pay a forged check and charge the amount to the depositor's account. The principal

exception to this rule is in the case of a check so negligently prepared that an alteration is easily made. The maker must use care in filling up his check; if negligent in this regard he can blame no one but himself.

15. Again, a bank that pays a forged check cannot recover the money from the payee when he is innocent. This may seem a hard rule, and is an exception to the general rule that money paid by mistake may be recovered. Both are innocent, one or the other must lose, but as the bank might, by greater vigilance have discovered the forgery, it must suffer. This rule applies only when the payee has not been negligent in any respect. When neither has been negligent, or both have been, the bank can recover the money.

16. In like manner payment by a bank of a check on a forged indorsement is no defence against a recovery by the rightful owner. Furthermore, an indorsement by a person bearing the same name as the payee, but not the real person, is a forgery, and payment to him will not excuse the bank from paying the true owner of the paper. In like manner each of several successive indorsers, who have advanced money on paper payable to order, though having no title thereto because the first indorsement was a forgery, can recover from his immediate indorser.

17. On refusal of payment, the holder should protest the check and notify the drawer as well as the indorsers, if there are any, whom he intends to hold for payment. If, however, the drawer has no funds in the bank at the time of drawing the check, presentment and notice are excused.

18. Nevertheless, the consequences of not presenting a check within the proper time and notifying the drawer if it is not paid, are not the same as the consequences to the drawer of a bill from the holder's neglect to present it at the proper time to the acceptor for payment. If this is not done by the holder of the bill the drawer is discharged. His liability is the same as that of an indorser. He promises to pay if the bill is properly presented to the acceptor and is not paid, and notice is given to him of the fact. But the drawer of a check is not discharged by neglect or delay to present it for payment, unless he has been injured by the holder's remissness. He still is liable, because he is the primary debtor, unless he can show that he has suffered by the delay. The law, though, presumes that in some way he has been injured, and, consequently, the holder is obliged to prove that the drawer has not lost anything in order to recover the amount due.

19. Checks are frequently certified. In doing this the title to that portion of the maker's deposit specified therein is transferred to the holder, who thereafter is a depositor having the same rights as any other. The holder of such a check should present it promptly for payment, or he will sustain the loss should the bank fail; and if it should pay the amount of a certified check long afterward to the original depositor, supposing that the true owner had disappeared, though requiring a bond of indemnity from him, this would be an acknowledgment that it belonged to the other.

20. A certified check implies that it is drawn on sufficient funds in the drawee's possession, that they

have been set apart for its payment, and that they will be thus applied on the presentation of the check for that purpose. "The certification is equivalent to an acceptance."[1] A distinction has been drawn between certification before and after delivery. The legal effect of the prior certification is to assure the party afterward receiving it that it is genuine and will be paid. The bank is bound as well as the drawer.[2] The legal effect of a subsequent certification on the holder's presentation is to render the bank an absolute debtor and to release the drawer and all indorsers.

21. A cashier is authorised to certify only those checks that are drawn in the usual manner. A bank would not, therefore, be liable on a certified check containing an unusual stipulation. But when a cashier or other employee of a bank is authorised to certify the checks of drawers having sufficient funds, his transgression of instructions will not relieve the bank from responsibility to an innocent holder.

22. A bank that certifies a forged check must pay for, as someone must lose by, the deceit; although unintentional, the bank in law must bear the loss.

23. A drawer who obtains a certification after he becomes insolvent commits a fraud, and the bank has a right to reclaim or countermand the payment of the check unless it has been previously transferred to an innocent holder.

24. Sometimes a bank is asked by a person who is about to take a certified check in payment of bonds

[1] Neg. Inst. Law.

[2] The drawer's liability during the proper period for presenting the check is the same as if it had not been certified.

or other property if it is good. The courts have not always regarded an affirmative answer in the same way. By some of them such an answer means that the signature is good and that the bank will be responsible for the amount certified. More generally the meaning is narrower, that the certification and also the maker's signature are genuine, and that his account is good for the amount certified. But the answer is no warranty or insurance that the amount stated in the check is the original or true amount. Nor can a bank reasonably be held by such an answer for the amount actually inserted by the drawer, because it has no knowledge usually outside the check itself. As the inquirer usually believes that the answer to his inquiry covers the amount also, a second inquiry should therefore be made on this point in order to remove all doubt. When a check is certified, as is often done, at the drawer's request, the bank makes a record of it, and consequently is able to answer a subsequent inquiry concerning the amount certified correctly. But when a check is presented by anyone else for certification, although the bank makes a record of its act, all that it can tell in reply to a subsequent inquiry is that the amount represented by the check corresponds, or does not correspond with the amount certified. The excess of a raised certified check that is paid may be recovered by the bank unless it acted negligently in making payment.

25. Sometimes checks are post-dated — that is, on a later day than the one on which they were actually written. The object of thus dating them is to obtain

delay in making payment, as the drawer simply undertakes to have the money in the drawee's possession on the day specified. A bank that pays an altered post-dated check before its true date cannot charge the amount against the drawer. In no case can a check that is paid before the time specified be charged to the drawer's account.

26. Sometimes a rule exists among clearing-house banks that checks received through the institution for payment may be examined and returned by a specified time. Wherever this rule exists entries of them made by the receiving bank previously to that time or cuts or other marks on the checks, will not prevent their return, nor operate as an acceptance or payment.

§ 6. Contract of Guaranty

1. Guaranty defined.
2. The promise must be to pay another's debt.
3. What language must be used to describe a guaranty.
4. It must be accepted.
5. The claim must be presented against the debtor before proceeding against the guarantor.
6. The limit of the guarantor's liability.
7. When he can revoke his guaranty.

1. A contract of guaranty is an acknowledgment or promise for another. An obligation is created to pay if the person who is guaranteed, called the principal, is unable to recover the money due from the debtor.

He must, therefore, bring an action within a reasonable time after the maturity of his claim against the primary debtor, and duly prosecute it, except in cases wherein nothing could be recovered were the attempt made.

2. By the statute of frauds a guaranty must be in writing. The promise to pay must be proved by clear and satisfactory evidence. But it is not always easy to decide whether a promise relating to the debt or liability of a third person is, or is not, such an one as the statute requires should be in writing. When the promisor's chief purpose is, not to be responsible for another, but to serve his own purpose, his promise need not be in writing, though the promise in form is to pay another's debt.[1]

3. What language ought to be used to describe a guaranty? On one occasion Chief Justice Gibson declared that warranty and guaranty signified the same thing, "the one usually, but not always, denoting a covenant in a conveyance, and the other denoting a parol promise." "I hereby guarantee the payment of the within certificate," is a guaranty; so is the form, "I hereby guarantee payment of the within note without protest." But "for a consideration I hereby agree to become security for the faithful performance," etc., is a contract of surety. And an order directing a person to give the bearer goods to a specified amount on the subscriber's account would render the person who gave it liable as a principal, and not as a guarantor. A stipulation in an agreement for the sale of goods, that a part of the purchase money shall be paid in

"good notes," is no guaranty of the solvency of their makers.

4. To become binding a guaranty must be accepted, and notice of acceptance must be given to the guarantor unless the act of guaranteeing is followed by an immediate acceptance. Likewise, a guarantor of future credit is entitled to notice from the party giving the credit that he has been accepted, unless the creditor's offer and the guarantor's acceptance are concurrent acts. But a direct promise to guarantee future indebtedness does not require an acceptance. For example, a guaranty of existing and future indebtedness, "unconditionally at all times," and a promise to sign a note for a purpose that is mentioned. Another guaranty of this character requiring no notice was thus expressed: "If A purchases a case of tobacco on credit, I agree to see the same paid in four months." And on another ocassion the guarantor wrote: "Give A a little more time and I will see that you get your money."

5. The law implies the due prosecution of the claim against the debtor by the party holding the guaranty, and failure to collect of him before the prosecutor can call on the guarantor. In other words, before the creditor can enforce his guaranty he must show that he has exercised due diligence to obtain payment from the principal. Whether he has been reasonably diligent or not is a question of fact that must be determined like any other whenever it arises.

6. A guarantor cannot be held for a larger amount or longer time than the original debtor. When his

liability ceases so does that of his guarantor. Nor can his liability be extended in any manner without his consent.

7. Often, but not always, a guaranty can be revoked, unless it relates to an unfinished transaction. Nor can a guarantor do so when he has received a consideration for guaranteeing what he retains. But a person who has guaranteed the payment of goods to a specified amount, and, after a portion has been delivered, desires to revoke his guaranty for the remainder, can do so unless he has been paid for guaranteeing the entire amount. There may be cases in which he could not do this regardless of the consideration received. If a seller, for example, relying on a guaranty, had ordered goods specially, and was liable for them, he could insist on delivering them and require the guarantor to fulfil his contract.

§ 7. Contract of Suretyship

1. Distinction between guarantor and surety.
2. Distinction is sometimes difficult to understand.
3. Surety ought to know the nature of his undertaking.
4. Creditor is not required to give surety notice of non-payment.
5. Note must be due before surety can give notice to collect.
6. Notice should be in writing.
7. When notice has been given creditor should not delay to collect.

8. If more time is given to debtor the surety is discharged.
9. Rights of parties to a security for the surety's benefit.
10. Liability of a surety incurred through an agent.
11. Tender of more than the money due.

1. The contract of suretyship is an original undertaking, and the person who guarantees or becomes a surety is called by that name, while the person for whose benefit the contract is made is called the principal. The surety is bound to the full extent of the principal's liability. The contract of a surety in one respect is similar to a guarantor's, but differs from that of an indorser. The latter undertakes to pay after he has received notice of a demand and non-payment by the maker, while no demand and notice are required to hold a guarantor or surety. But a guarantor's liability does not become absolute until the creditor has exhausted legal means to collect of the debtor; while a creditor to whom one has become a surety is not obliged to resort to any legal means against the debtor, unless he is notified to so do by the surety, to establish his right to proceed against the surety himself. It is true that the creditor usually seeks first to collect of the debtor, but he may first proceed against the surety. Again, the creditor is always excused from proceeding against the debtor whenever nothing could be recovered from him, for the law does not require the prosecution of a useless action.

2. While there is a difference between the liability of a surety and that of a guarantor, it is not always easy to determine by the agreement which liability is assumed. On one occasion the owner of a judgment "guaranteed payment thereon in one year from date." He was regarded as a surety, and as the time of payment was extended without his consent he was discharged. On another occasion the indorsement on an order, "I hereby become security for C for the fulfillment of the within obligation," created a contract of suretyship. Again, by the following indorsement the signer was declared liable as a surety: "I hereby acknowledge to be security for the within amount of $5,000 unless satisfactorily paid by W. W." So were the following indorsements: "I will see the within note paid," "guarantee payment when due;" "agree to its terms." The promise or contract of suretyship must be in writing to comply with the statute of frauds.

3. A surety ought to understand the nature of his undertaking. If he does not he cannot ask to be relieved should one who has signed by mistake a note as maker be subsequently released. Nor can a surety on a note be relieved from liability to the holder who has taken it for a valuable consideration by showing that his instructions relating to the completion of it were not followed; for as the surety has created confidence by putting the note, though incomplete, into the debtor's hands, he must suffer the loss that befalls an innocent party.

4. A creditor is not required to give notice to his surety of the non-payment of the note at its maturity,

nor display any diligence in recovering from the debtor before proceedimg against the surety himself. Consequently a surety is not discharged by the creditor's omission to bring an action against the principal debtor. But if a surety, or one properly authorised for him, gives his creditor a positive and clear direction to sue the principal debtor at a time when the debt can be collected, which is disregarded, the surety will be released.

5. The note or other obligation must be due before the notice can be given. A notice, therefore, by a surety on a note not yet due, that he will not remain responsible if the holder does not sue the principal debtor as soon as the debt becomes due, or that the holder must get another security, will not discharge the surety.

6. Formerly, the notice need not be in writing, though this was always regarded as better evidence, but in some states a statute has been enacted requiring a written notice.

7. A creditor who has been notified must not only begin his action against the principal immediately, or without any unnecessary delay, but must prosecute it with all reasonable diligence. So long as a creditor is not notified his silence can never affect his remedy against the surety. Mere forbearance or delay, however injurious to the surety, will not discharge him.

8. If, for a consideration, more time is given to the principal debtor to pay, without the surety's consent, who is thereby prevented from proceeding against the debtor, this discharges the surety. Often he escapes

through the creditor's forgetfulness or disregard to obtain his acquiescence to an extension of the time of payment given to the debtor. Doubtless in most cases a surety would readily consent, but he is not asked, the extended time expires, the debtor does not pay, and the surety is released.

9. Having shown the nature of a surety's undertaking, and when he is discharged therefrom, we shall next consider the rights of parties to the security often given to secure a surety. And first, a security held by a principal who is paid by the surety passes to the latter for his protection. For example, a mortgage that has been given to a creditor as security who is paid by the surety, passes to him. Again, a creditor, even though he may not have known in the beginning of the security held by a surety for his indemnity, or for the payment of his debt, is none the less entitled to this additional protection.

10. Sometimes the obligation of a surety is incurred by the request or solicitation of an agent. Whenever this is done, and the surety pays the debt for the principal's benefit, he is answerable to the surety. And if the secretary of an association has induced a person to become a surety on a note, it cannot repudiate the secretary's authority and yet retain the benefit of the act.

11. Should a party who has promised to pay money tender more than the whole debt, it would be generally valid, but the money must be tendered solely in discharge of the debt. If the object of the tender, besides discharging the debt, is to impose a liability on

the creditor it is not valid. It has ever been held that the tender of a sum exceeding the debt, accompanied with the demand that the creditor shall make the change and return the balance, is in law no tender.

§ 8. Contract of Partnership

1. What is a partnership.
2. Secret and dormant partners.
3. There may be more than one partnership name.
4. When a single joint transaction does not constitute one.
5. Effect of agreements between partners.
6. Persons who are not partners may be thus liable.
7. Intention and participation in the profits as a test of partnership.
8. Factors and brokers are not partners.
9. A firm may hold any kind of property.
10. Authority of a partner.
11. What a partner cannot do.
12. A partnership has no seal. Mode of conveying.
13. A partner's authority to bind his firm under seal.
14. They must act as partners to bind each other.
15. The receiving of a new member constitutes a new firm.
16. Money lent to a partner for a particular purpose is a partnership debt.
17. Money lent to a partner is presumed to be for partnership use.
18. Money lent on the credit of a single partner can be recovered only of him.

19. A partner is liable for the acts of his co-partner because he is a general agent.
20. A partnership is liable only to a creditor dealing in good faith.
21. When the firm is liable for the criminal acts of a partner.
22. But an illegal contract does not bind a partnership.
23. Mode of dissolving a partnership.
24. When a partner will be prevented from transferring his interest.
25. Effect of death of a partner.
26. Effect of insanity or imprisonment.
27. When a firm is thus dissolved an account may be taken.
28. Sale of a partner's entire interest causes a dissolution.
29. Effect of the retirement of a partner.
30. He should give notice of his withdrawal.
31. A dormant or secret partner is not liable after his retirement.
32. Liability of a firm and partners for firm and individual debts.
33. Effect of dissolution.
34. The survivors are not partners.
35. Authority of a liquidating partner.
36. To whom payment should be made.
37. Authority of a partner to take the firm's property and pay its debts.
38. Limited partnerships.

1. A partnership is a combination of two or more

persons of their property, labour or skill for the purpose of making a common profit. Frequently the word firm is used instead of partnership, but in law the term partnership is the more common. Any persons who are competent to transact business on their own account may form a partnership.

2. A secret partner is an actual participant in the profits of the concern, but is not avowed or known to be one. A dormant partner takes no part in, or control of the business. Even though creditors do not know of their connection with the firm at the time of giving credit, both are liable, if their partnership relation is discovered, on the ground of their interest and participation in the profits. But if the relationship was known at the time of their purchase, and credit was given only to the open partner, the other would not be liable. A nominal partner holds himself out to the world as one, when in truth he is not. He also is liable to creditors of the firm, for the reason that he justifies them in trusting the concern on his credit.

3. A partnership usually has only one business name, but there is no objection to the use of different names, especially for distinct business transactions. Thus, there may be a firm of A, B & C for general business, and A, C & Co. for buying and selling negotiable paper.

4. A single transaction of several persons from which neither profit nor loss arises, will not create a partnership. Nor will a purchase by them all if each party takes his distinct share. But persons may act as partners in a single transaction. On one occasion A

chartered a vessel to take a cargo of flour from Philadelphia to Lisbon. A part of the flour belonged to A, a part to B, and the remainder to C, who was in Lisbon. It was sent to C and was marked as his property for the purpose of protecting it from British cruisers. Had the vessel reached Lisbon the flour would have been sold by C. The three were regarded as partners in the transaction. More generally, whenever there is an agreement to enter into business, or to do some particular thing, and to share the profits and losses, this constitutes a partnership. The partners may agree to share the profits in whatever proportion they please; in the absence of an agreement it is presumed they are to share equally.

5. Partners may agree concerning the mode of dividing the losses, or that one or more of their number shall sustain them. An agreement of this kind is valid between them, but all are responsible to third parties, unless they knew of the agreement. More generally, stipulations in articles of co-partnership, limiting the power of a partner, are not binding on third parties who are ignorant of them. In other words, each partner is absolutely responsible to every creditor for all the debts of the firm. Business could not be safely done with a partnership were secret agreements between the members binding on others. Unless outsiders have knowledge of them, they are in no way affected by them.

6. Persons may be liable as partners to third parties who are not partners as between themselves. If by his speech or conduct B is led to believe by A that he

is a partner in a firm, and thus believing a contract is made with A, to which the firm is a party, A is responsible, even though he is not a partner. Again, should he declare that he had an interest in the concern with others, or conducted the business of the partnership as a partner, accepted bills or suffered his name to be used on cards, or signs, or in advertisements, the law would regard him as a partner. The reason for this rule is plain. It is to prevent loss to which creditors would be exposed. The declarations or acts, however, of one person cannot make another person liable as a partner without his coöperation or consent by word or act. Again, though one should hold himself out to the world as a partner when he really was not, he would not be responsible to a creditor who knew the truth.

7. What act may be regarded as establishing or tending to establish the partnership relation is not easily answered. Two persons, not partners, who nevertheless so act and speak as to lead the business men of the community in which they live thus to regard and trust them, the law considers as holding that relation. Therefore, should they purchase a stock of goods and agree to give their joint notes for them, and one partner in the other's absence should do so, his act would be strong evidence of a partnership, rendering both liable therefor. On one occasion a partner in a grocery store bought lumber on his account and gave a note signed in the firm's name, which the payee indorsed to L, who received it without any knowledge of the purpose for which it was given.

Though the partner's conduct was a fraud, the firm was liable, but it would not have been had L known the nature of the transaction. Should two persons be sued as makers on a note signed by one, who is a member of a partnership, and the other should admit his liability, this would be evidence of the existence of a partnership.

There has been much discussion concerning the test of a partnership. Sometimes the courts have said that the true test was an interest in the profits and in the sharing of the losses. Both have been regarded as essential to create a partnership relation. Of late the courts look more to the actual intention of the parties and their actual ownership of the funds of the partnership. One may think that this question can always be easily answered, but it cannot be. Thus, a clerk may receive in the way of compensation a share of the profits for his skill or other ability. In such cases is he to be regarded as a partner, or is this division of profits simply a mode of remunerating him? The courts have not always been uniform in deciding this question. In the later cases, especially, a clerk who is renumerated in this manner has not been regarded as a partner. Whenever a partnership fails, of course creditors are desirous of sweeping within the range of liability the greatest number of persons possible, and it is on such occasions that this question arises concerning the composition of a partnership.

8. Factors and brokers who do business for a commission on the profits, masters of vessels who engage for a share of the profits, and seamen employed in the

whale fishery, are not partners. The question relating to seamen engaged in whale fishing was decided many years ago, when that was an important industry. If there was a good catch then the profits might be very considerable; if unsuccessful, then the seamen received nothing besides their living and perhaps their outfit for their toil. The shares they received were called lays; in one sense the business was a kind of lottery, depending largely on unknown conditions.

9. A partnership usually may hold any kind of property; real estate as well as personal. It may be formed to buy and sell land, or cultivate it. Usually partnerships exist for the purpose of the production, or the purchase and sale of personal property. There are, however, land companies for the improvement and sale of land.

10. The authority of a partner is very great. Every partner is a general agent of the partnership, having authority to bind all its members and property in transactions that relate to the usual business of the firm. His authority extends to the making or indorsing of negotiable paper, and to all transactions that are within the usual business of the firm. But the holder of an indorsed note or bill, who ought to have known that the partner had no right to indorse it, has no claim against the partnership.

11. A partner cannot render his firm responsible for the debt of another. He cannot sign a letter of credit, nor submit a disputed claim to the decision of others, because these things do not belong generally and properly to commercial business. Of course, any acts of

a partner may be adopted and ratified by his co-partners, and when they are, have the same force as if they had been originally authorised. Such ratification may be in a formal manner; or by doing things from which a ratification can be implied, especially receiving and retaining the results of such action; for example, taking and holding money resulting from a transaction.

The contemplated action of the majority may sometimes be restrained by the minority. A partner may stop a negotiation just begun, and prevent a bargain that would bind him, by giving notice to the party in season of his refusal. But a notice not given soon enough cannot prevent its completion, as such party ought not to suffer.

12. A partnership has no seal and can have none. Deeds and other instruments are sometimes executed, A, B & Co., with a seal added or affixed to the name. This, in truth, is no seal at all. But a seal to a deed given by a partnership has sometimes been declared to be the seal of each partner. As their intention in such cases is to make a good conveyance, the law in some states, perhaps, has been rather lax, declaring such instruments to be valid, notwithstanding their obviously imperfect form. The correct mode of execution by every partner is to sign his name and add his seal.

13. Formerly, a partner could not bind his co-partners by an instrument to which he had added a seal after his name, unless thereto authorised by a similar instrument. Even by acknowledging his

authority afterward, the defect was not cured. Now, a partner may bind his firm by a sealed instrument executed in the firm name and pertaining to ordinary partnership business whenever his partners consent before its execution, or adopt and ratify it afterward. Furthermore, their consent or ratification may be by word as well as by seal.

14. Partners to bind each other must act as partners. Thus, a partner who should make a note and sign it in his own name and also his partner's name, would not bind his partner, for he has no authority to make such a note. His only mode of signing is the partnership name. If he signs as an individual he can be held as an individual; if he signs the name of another partner, without authority, the latter cannot be held liable thereon.

15. The receiving of a new member constitutes in law a new firm. It may recognise the old debts by agreement, or by paying interest, or in other ways. When this is done the new firm is liable for the old debts, but there must be some act from which the assent of the new member to become liable for the old debts may be inferred, otherwise he is not liable for them. Ordinarily, he would not think of doing such a thing without receiving some kind of benefit. Consequently, the law protects him from liability unless he clearly has agreed or promised to pay them.

16. Money lent to a partner for partnership purposes is a partnership debt. Again, a partnership is responsible for money not used for partnership purposes, but borrowed under circumstances that

justified the lender in supposing that it was to be thus used. And a partner who uses money that he has in his possession as a trustee for a partnership purpose with the knowledge of his partners renders the partnership liable therefor. Even though not knowing that the money was of this nature, if they were directly benefited by the transaction, they would be regarded as having authorised its use and consequently would be responsible.

17. Without evidence showing to whom the credit was given, the fact that money lent to a partner was applied to the use of his partnership concludes its liability.

18. A person who gives credit to a single partner can look only to him, although the money was applied for a partnership purpose; but a partner who declares that he is borrowing for the firm to which the lender gives credit, and the transaction is a fair one on the lender's part, renders his firm liable, although the money is wrongfully appropriated by the partner to his own use. The application of this principle has sometimes been severe on partnerships, but it is evidently just. It is one of the consequences of the authority possessed by a partner. If, on the other hand, a partner was not authorised to borrow unless with the consent of his co-partner, then a firm would often be hampered in doing business. It seems necessary, therefore, for the successful transaction of partnership business, that each partner should have authority to borrow, notwithstanding the great danger of abusing it by thus wrongfully using money borrowed

on the credit of a partnership for an individual purpose. If someone must lose in such transactions surely the partnership that has given rise to the creation of such authority ought to be the loser, rather than an innocent person who may have trusted a member supposing that he had full authority to borrow money.

19. The ground of liability of a partner for the acts of others is that of a general agency for the transaction of all business within the scope of the partnership. The law of partnership is only a branch of the law of principal and agent. As an eminent jurist has remarked, the real ground of liability of a person as a partner is that the business has been carried on by persons acting for him.

20. A partnership is liable only to one who deals with a partner in good faith. Thus, one who receives negotiable paper bearing the firm's name, knowing that it was not given in the business of the firm, and was without consideration, cannot hold the firm. And a creditor of a partner who should receive for his separate debt a partnership security, would be guilty of a fraud unless the partner had, or was supposed by the creditor to have, the authority of the rest.

21. Again, a partnership may be liable for an injury caused by the criminal or wrongful acts of a partner committed in transacting partnership business, and especially if the partnership gave to the wrong-doer the means and opportunity of wrong-doing. Thus, co-partners are liable for the fraudulent representations of a partner relating to partnership business, though

having no knowledge of them at the time they were made, nor approving of his conduct in making them after it was known. Says an eminent jurist: "It has long been established that a partner is liable for the consequence of frauds practised by his co-partner in the transaction of the business of which he was entirely ignorant, and although he derived no benefit from the fraud. This is upon the ground that, by forming the connection, partners publish to the world their confidence in each other's integrity and good faith, and implicitly agree to be responsible for what they shall respectively do within the scope of their partnership business."

22. An illegal contract, however, made by a partner will not bind his partnership, for all the parties are supposed to know the law, that no bargain can be enforced which is illegal. Thus, a partner who should borrow and agree to pay usurious interest, would not bind his partners by the transaction, for an agency or authority to an agent to violate a statute cannot be implied. Such an act is clearly illegal, and is not within the scope of a partner's authority.

23. Next we may inquire concerning the mode of dissolving a partnership. When the agreement says nothing, it may be dissolved at the pleasure of either party. No partner, however, can exercise this power wantonly, to the injury of the other partners, without making himself responsible for the losses caused by his act. If there be an agreement, fixing a period for its existence, this is binding.

24. Should either partner attempt to transfer or

assign his interest, for the purpose of withdrawing from the firm against the will of the others, and without good reason and contrary to his agreement, a court of law would prevent him from thus acting. For the consequence of transferring his interest would be to dissolve the partnership, and surely he ought not to be permitted to do this without good reason. If, however, a proper reason exists he may transfer his interest. By so doing the person to whom his interest is transferred does not become a member of the firm.

25. The death of a general, or even special partner, causes a dissolution. His personal representatives, who are his executors or administrators, do not take his place unless the terms of the partnership state that they are to succeed him. There are various reasons why death should dissolve a partnership. First of all, when persons form a partnership they are supposed to know each other, their ability, means, etc., their general fitness to engage in the common enterprise, and it would be inexpedient for the law to permit others to take the place of a deceased member. It is true that a dissolution in case of death may work hardship, and perhaps loss to a partnership, by the withdrawal of the means, credit, and ability of the deceased member. That is one of the risks always taken in forming a partnership; but it is safer to regard a partnership as dissolved whenever a member dies than it would be as continuing.

26. If either party is unable to do his duty by reason of insanity or imprisonment, or is guilty of wrongdoing, a court will declare the firm to be dissolved; and

if the original agreement was a fraud a court will also declare it void from the beginning.

27. Whenever a dissolution is thus decreed or declared an account will be taken by the partners, when requested by any partner. Moreover, a court will order a sale of the effects and distribute the proceeds. Such a decree will also be made when a partner dies or becomes bankrupt.

28. The sale of the entire interest of a partner by order of the court, to pay his individual indebtedness, causes dissolution. A partner may owe a large sum of money outside the partnership for his individual transactions, and his interest in the partnership may be taken by creditors to satisfy their claims. This is by no means an infrequent thing. The dissolution thus caused may be, indeed, unfortunate for the other partners, but it is one of the risks of uniting in the undertaking.

29. The retirement of a partner also causes a dissolution. The law regards the remaining partners as a new firm, even though the name remains unchanged.

30. A retiring partner should give notice by public advertisement of his retirement. It is also said that he should give personal notice, by letter or otherwise, to all who usually do business with the firm. This is not the rule everywhere. After such a notice he is not responsible, even though his name is retained by the other partners in the firm without his consent. Nor is he responsible to anyone who has actual knowledge of his retirement.

31. A dormant or secret partner is not liable for a debt contracted after his retirement, although no notice has been given by him; for, as he is unknown and cannot add credit to the firm, his retirement does not affect his liability.

32. The property of a partnership is bound for partnership debts, and the creditor of a partner has no claim to partnership funds until the partnership debts are paid. If there be a surplus such a creditor may take that partner's interest therein in payment of his private debt. But what shall be said concerning the individual property of partners? Is that held first for their individual debt? The courts have not always been uniform in their decisions, but the rule best established is that partnership property is held for partnership debts, and individual property for the debts of individual members. If there be a balance of partnership property after the payment of its debts, it belongs to the partners and can be applied to the payment of their individual debts. On the other hand, if there be property left by a partner after paying his individual debts, it may be devoted to the payment of the debts of the firm of which he is a member.

33. Lastly may be considered the effects of dissolution. If caused by the death of a partner the whole property goes to the surviving partners, not, indeed, as their own, but only for the purpose of liquidating the indebtedness of the partnership. If they continue the business with the partnership funds they do so at their own risk, and the representatives of the deceased

may require the return of the capital he invested and also his share of the profits.

34. The survivors are not partners, but simply owners with the representatives of the deceased of the stock or property in their possession. After a dissolution no one has authority to make new contracts in the name of the firm, except as we have already mentioned, in the way of settling its affairs. It is a common thing to provide that on the dissolution of a partnership by mutual consent one partner shall settle the affairs of the concern, collect and pay its debts, and the like, but this will not prevent any person from paying a debt to any other partner due to the firm. If this is done in good faith his release or discharge is valid.

35. A liquidating partner can do many things. He can give renewal notes, make indorsements, and collect money that is due to the concern. He can also revive a debt against the partnership that has become outlawed, because the owner has not collected it within the period fixed by law.

36. After transferring the assets of a firm to any partner or other person for the purpose of liquidating its debts, any debtor who had notice of this would be bound to make payment to such person; and if he paid anyone else he could be required to pay the money over again.

37. An agreement between a liquidating partner and his other partners, whereby he is to take all the property and pay all the debts, though valid between them, has no effect on the rights of third parties. They

have a valid claim against the partners, of which they cannot be deprived without their consent. The consent of a creditor may be inferred, though not from slight evidence.

38. Lastly may be considered the subject of limited partnerships. These are the creation of statute and have been established in many states. A limited partnership may be formed for transacting agricultural, mercantile, mechanical, mining or manufacturing business. The partnership may consist of one or more persons who are called general partners, each of whom is responsible for all the debts. Besides general partners, other persons, called special partners, who are not liable for the debts of the partnership beyond the amount thus contributed by them, may contribute specific sums in actual money as capital. The general partners only are authorised to transact business and sign for the partnership. The persons forming such a partnership are required to make and sign a certificate containing the name under which the partnership is to be conducted, the general nature of the business, the names of all the general and special partners, and also the amount of capital contributed by each special partner, and the period for beginning and ending the partnership.

A special partner may sell or assign his interest with the assent of his partner in writing without causing a dissolution of the partnership. A general partner with the written assent of his partner may also sell and dispose of his interest in the partnership; or on his death his administrator may, in like manner, sell his interest

for the benefit of his estate. A special partner from time to time may examine into the state and progress of the partnership and may advise concerning its management, but he cannot transact any business nor can he be employed as an agent or attorney. Furthermore, the law generally provides that interference in its affairs contrary to law renders him liable as a general partner. The capital of the partnership may be enlarged by increasing the membership of special partners, or by new subscriptions from the old ones.

The law in most states provides that the terms of the partnership must be recorded and published so that the public may have an exact knowledge of its nature; and all renewals or changes must have similar publicity. This is for the purpose of protecting the partners, as well as for the benefit of those doing business with the firm.

§ 9. Contract of Shipping

1. A ship is personal property.
2. Law relating to registration.
3. Special regulations.
4. Exclusive privileges.
5. How a vessel may be transferred.
6. What passes by the word ship in selling her.
7. When persons are owners who pay in instalments.
8. Part owners.
9. They are not partners.
10. But they may be partners.

11. Majority may direct the vessel's employment.
12. Employment of vessel when part owners are equally divided.
13. When and to what extent is each part owner entitled to share in the earnings.
14. Transfer by part owner of his interest.
15. Ship's husband.
16. When his authority binds all.
17. Pledge of ship for borrowed money.
18. When loan is not a bottomry one.
19. When bottomry loans are usually made.
20. Interest not mentioned is included in principal.
21. Employment of ship. Bill of lading.
22. Delivery of goods to consignee.
23. Bill is not binding concerning quality of goods.
24. Lien for freight money; meaning of term.
25. Cannot be demanded without delivering goods.
26. Agreement to make prior deliveries destroys liens.
27. Agreement is to carry all to place of destination.
28. How shipper may recover his goods.
29. Payment of freight money for part of distance.
30. When consignee is not liable for freight money.
31. Payment of freight money in advance.
32. Recovery of excessive payment.
33. Recovery of freight money after the sale of a ship and the beginning of a voyage.
34. To earn freight money the voyage must be legal.
35. Shipper or consignee cannot abandon the goods.
36. Law relating to passage money.
37. Letting of a ship.
38. Nature of a charter party.

39. What hirer may do with a ship.
40. Voyage may be double and the liability in such a case for freight money.
41. Time and demurrage.
42. For what demurrage is due.
43. How the contract may be dissolved.
44. Navigation of a ship; authority of master.
45. His authority from necessity:
    a.— Sale or pledge of ship,
    b.— Charter of ship,
    c.— Authority to bind owners for repairs,
    d.— Authority to substitute another master,
    e.— Majority can remove him.
46. He has nothing to do with cargo.
47. Owner is not responsible for wrong-doings of master.
48. Liability for collisions.
49. Seamen.
50. Their lien for wages.
51. Provisions; when double wages are given.
52. How their complaint of the ship's unworthiness must be treated.
53. A ship must have a medicine chest.
54. A seaman's right to be brought back.
55. Rights of persons who repair and furnish supplies.
56. Liability of part owners for repairs:
    a.— When they are individually liable,
    b.— How far one part owner can bind another,
    c.— Generally the real or beneficial owner is liable.

1. A ship is personal property, and her ownership and transfer are regarded in this country by rules similar, in some respects, to those that apply to real property. The Federal Constitution authorised Congress to enact laws for regulating commerce. Accordingly, in 1792 an act was passed for registering the names of the owners of ships and for navigating them.

2. By this act an American vessel may be registered in the custom house. The law does not say that this must be done, but the disadvantage of not complying is so great that all vessels are registered. The ships that may be registered are those built within the United States, and owned wholly by citizens, as well as some others that need not be mentioned. No ship can be registered whose owner, or part owner, resides abroad, although he is a citizen, unless he is a consul of the United States, and an agent for, or partner in, an American mercantile house. The master must also be a citizen of the United States. The law also declares that a vessel whose owner, or part owner, is a naturalised citizen and resides in the country whence he came more than a year, or in any foreign country more than two years, cannot be registered unless he is a consul or public agent of the United States. But a ship that has lost the benefits of registry by the non-residence of an owner may be registered anew if she becomes the property of a resident citizen by actual purchase.

3. Sometimes Congress by special acts permits the registration of a vessel as an American ship that has become so by purchase. The certificate of a regis-

tered American vessel that has been sold or transferred must be delivered up, or the vessel is forfeited. As soon as a registered vessel arrives from a foreign port her documents relating to ownership, freights, etc., must be deposited with the Collector of the Port to which she has come, and the owner or master must take oath that the register contains the names of all persons who are then owners of the ship, and at the same time report any transfer that has been made within his knowledge since the registry was made, and also declare that no foreigner has any interest in the ship. A register issued fraudulently, or with the knowledge of the owners, for a ship that was not entitled to one, would be void and the ship would be forfeited. After the issue of a new register the former must be surrendered. If a ship is transferred while at sea the old register must also be given up, and all the requirements of law concerning registry must be fulfilled within three days after her arrival at the home port.

4. Exclusive privileges at various times have been granted to registered vessels of the United States. A ship that is not registered nor licensed can sail on no voyage with the national protection. If she engages in foreign, or coasting trade, or fisheries, she may be forfeited, and if she has foreign goods on board, must also pay the tonnage duties that are levied on foreign ships. It may be remarked that every ship engaged in honest business, belonging to a civilised people, has regular papers showing her nationality, unless they have been accidentally lost.

5. The statute relating to registration also provides how a vessel may be transferred. Whenever a sale or transfer is made there must be an instrument in writing of the nature of a bill of sale. A mere oral transfer, even though there was a valuable consideration, followed by possession, would give the transferee no right to claim a new registry setting forth his ownership. By a statute passed in 1850 no bill of sale or other conveyance is valid, or affects any person except the seller, unless it is recorded in the office of the collector of customs where the vessel is registered or enrolled. As a ship is personal property, the transfer should be accompanied by delivery of possession. Actual delivery is impossible where a ship is at sea. In such a case possession should be taken as soon as possible.

6. By the word ship, and still more by the phrase, ship and her appurtenances, or apparel, or furniture, everything passes connected with a ship and that is on board of or fastened to her needed for her navigation or for her safety.

7. Sometimes, during the building of a ship, payments are made by instalments. The persons who pay from time to time sums that are deemed equivalent to the labour and materials used, are regarded as the purchasers; and if she is lost they are the losers.

8. Two or more persons may become part owners of a ship in either of three ways. They may unite in building her, may join in purchasing her, or each may purchase his share independently of the others; in either case their rights and obligations are the same. If

the register does not designate the proportions owned by each one, they are presumed to own the ship in equal shares.

9. A partnership relation is not to be inferred from part ownership. If existing at all, it is by virtue of an agreement expressed or implied; it cannot be implied from the ownership of several persons of the same vessel. They are therefore tenants in common, and not partners.

10. Though individuals are simply part owners or tenants in common in the ownership of a vessel, they may be partners in employing her. When thus united as a partnership in employing her, they are liable as partners to third persons, and the earnings of the vessel are partnership funds. Whether the partnership between the part owners in employing the vessel is a continuing one, covering all voyages, or is restricted to a particular venture, is a question of fact to be determined by proper inquiry.

11. A majority of the owners may generally manage and direct how the vessel shall be employed. But as a ship is built to plough the sea, and not to lie by the wharf, there are certain positive rules relating to her employment. The employment of the ship is not, like the employment of a horse or other chattel, considered a matter of private concern alone, but through state action minority part owners may keep her employed against the wish of other part owners not so desiring. Such action is founded on the idea that the employment of a ship is a matter of public concern and interest.

But when the majority in interest desire to employ

the vessel in a particular way, they may prevail against the wish of the minority. In a well-considered case the court declared that "if the minority happen to have possession of the ship, and refuse to employ it, the majority may, by warrant for that purpose, obtain possession of the ship and send it to sea, upon giving the customary security to the minority for its safe return."

12. Again, suppose the owners are equally divided with respect to the employment of the vessel, who shall control? When the question is one of employment or non-employment, the party desiring its employment is entitled to possession and control, but when the conflict is over the question of the mode of employment, a court will not undertake to decide on the merits of the controversy, and award possession of the vessel to one party or the other. If they cannot decide among themselves the only remedy is to sell the vessel, and this, on a proper application to an admiralty court, will be ordered. "The tendency," says a recent writer of the courts, "is to confine the power of sale to cases where the warring interests are equal, both desirous of employing the vessel, and where, therefore, the ordinary rules as to the control in the case of disagreeing part owners would give the control to neither, and the effect of denying a sale would be to keep the vessel in idleness."

13. A tenant in common who has possession of a chattel may use it for his exclusive benefit, and likewise is liable for all charges affecting it. Though part owners of a vessel are tenants in common, the rule is

modified in its application to them. Each part owner is entitled to receive his share of the earnings of the vessel unless he dissented from the voyage. The majority of part owners, therefore, cannot by excluding the minority from the possession of the vessel, deprive them of the proportion of the vessel's earnings. But a part owner who deserts from a proposed adventure absolves himself from the risk of loss and cuts himself off from sharing in the gains.

14. A part owner can transfer his interest without giving a notice to or obtaining the consent of the others. On the other hand, part owners, however numerous or large their interest, cannot by sale or mortgage affect the title of any opposing co-owner to his share in the vessel.

On his death his interest goes to his representative, and not to the other part owners.

15. The ship's husband, as he is called, is the agent of all the owners for the management of the ship, and is usually a part owner. He may be appointed by writing or otherwise. His duty is to provide for equipping and repairing the ship and taking care of her while in port. He also furnishes all regular and proper papers and makes contracts for freight or passengers, collects the receipts and pays the debts. He cannot, without special authority, insure the ship for the other owners, nor buy a cargo, nor borrow money, nor give up a lien on the cargo for the freight, nor authorise someone else to do these things for him.

16. When he does not exceed his authority he binds the other part owners, but a third person may deal

with him on his personal credit. And if they, believing he has thus dealt with a third person, settle their accounts with him, they are not liable to the creditor. He cannot establish a claim against them. To a ship's husband who is not a part owner every part owner is liable for the whole amount.

17. A ship is sometimes pledged as security for money borrowed. This contract is called bottomry. The essential features are: first, that the ship is bound for the payment of money; second, that it is to be repaid only in the event that the ship performs a certain voyage and arrives at the end in safety. Therefore, if a ship is previously lost, or before the expiration of the period specified, no part of the money is due; in other language, the whole debt is paid by the loss. As the lender thus consents that the repayment of the money shall depend on the safety of the ship, he has a right to charge an additional amount to the legal interest in order to cover his risk. This is called marine interest.

18. A contract, whereby the lender takes more than legal interest, and is to be repaid, notwithstanding the loss of the ship, is not one of bottomry, and is illegal. But the lender may take marine interest and security for his debt in addition to the ship itself, in order to make the payment more sure on the arrival of the ship, provided that no payment is to be made in the event of her loss.

19. The most common contracts of bottomry are made by a master in a foreign port when money is needed and cannot otherwise be obtained. Sometimes

they are nothing more than contrivances to get a large rate of interest. If the money is payable at the end of the voyage and the owner or master terminates the voyage sooner, either honestly or from a change of plans, or dishonestly by wrecking, or in some other way destroying the ship, the money is at once due.

20. When interest is not mentioned in the contract it will generally be regarded as included in the principal.

21. The rights and duties of the ship-owner and of the shipper are stated in an instrument called a bill of lading. This is a very ancient document, used by all commercial nations. It contains the names of the consignor, of the consignee, of the vessel, of the master, of the place of departure and of destination; also the price of the freight and other charges, and a sufficient description of the goods to indicate what they are. It is signed by the master of the ship. He ought not to sign it until the goods are actually on board, but very often this is done before. Usually, a copy is retained by the master and three copies are given to the shipper, one of which he retains, another is sent to the consignee with the goods, while the third is sent to him in a different way.

22. The delivery is to the consignee or his assigns; in other words, to him or to such person as he may direct. This direction may be made by indorsing the bill and ordering the delivery of the goods to another; or the consignee may indorse the bill in blank, and whenever this is done any person who acquires an honest title thereto may write over the signature

an order of delivery to himself. It is said that the consignee has this power to assign the bill even if the word assigns be omitted. As the indorsement transfers the property in the goods, the indorsee has a right to demand them. But on the non-delivery of the goods an action on the bill must be brought in the name of the original consignee.

23. As the bill of lading is evidence against the ship-owner that the goods have been received, and also of their quantity and quality, it is common to say "contents unknown," or "said to contain." Even without such words the bill of lading is not absolutely binding on the ship-owner, and he may, therefore, show that its statements were erroneous, either intentionally or by mistake.

24. The ship-owner has a lien on the goods for the freight money. The word freight is used in different senses. Sometimes it means the goods or cargo carried; sometimes the money paid by the shipper to the owner for carrying them. When the term is used in this latter sense the word money is often added, "freight money," which leaves no question concerning what is meant.

25. The master cannot demand freight money without delivering the goods or offering to do so at the proper time, in the proper way, to the right person. After doing this the consignee is not entitled to the goods without paying the freight money due on them. This lien is established by law whether it is mentioned in the bill of lading or not.

26. By the common law an agreement to deliver

goods before paying the freight money for carrying them destroys the lien. But, unless the ship owner intended to give up his security on the goods, it is said that a court would be inclined to preserve the master's security on the goods for a reasonable time, unless they should actually become the property of another by purchasing them.

27. The contract for carrying goods is for carrying the whole of them to the place of destination. Were a ship wrecked and the voyage not completed, there would be no right to recover compensation. But if a wreck or other accident happens, the master has the right to put them in another vessel and send them forward to their destination, and on their arrival he may claim the whole freight money. He not only may, but must send forward the goods at his own cost if he can do this by any reasonable means. He is not responsible, however, for any delay thus occurring.

28. The shipper, by his agent, may always recover his goods at any intermediate place by tendering all the freight money, because the master's right of sending them forward is merely to earn this. On the other hand, as the master cannot be deprived of his right to send them forward unless the shipper pays all the freight money, he must do this whenever he desires to obtain possession of his goods, however greatly they may be injured.

29. There are cases in which freight money is payable for a part of the distance, or to a certain degree, and the question is somewhat difficult, by what rule or proportion shall the freight money be measured?

One rule is purely geographical and was formerly much used. That is, the whole freight money is payable for so many miles, and for a shorter distance in proportion. Another is of a purely commercial character. As the freight money is a fixed sum for the whole distance, what will it cost to bring goods to the place where they were received, and how much to take them to their original destination? Neither of these rules has been generally adopted in this country.

30. A bill of lading requires delivery to the consignee or his assigns, "he or them paying freight," being the usual form. If the master delivers the goods without receiving the freight money he cannot fall back on the consignor and make him liable without showing that he actually owned the goods. Generally, the one who receives them is liable for the freight money; but he is not if merely an indorsee or assignee of the consignee and obtains them by his order. If the master delivers goods to anyone, saying that he will look to him for the freight money, he may demand this of him, unless that person had the absolute right to them without paying it. This is rarely the case.

31. If freight money is paid in advance, and is not afterward earned, it must be repaid, unless the master can show that the owner took a less sum than he would otherwise have taken, and for this or some other reason the money paid was in final settlement, and was to be retained by the owner at all events.

32. Again, should a consignee pay too much, he may recover the excess, if it was paid through ignorance, or

mistake; but he cannot do this if the payment were made with the full knowledge of all the facts, and his ignorance or mistake was simply concerning the law.

33. One who sells his ship after the beginning of a voyage can claim the freight money of the shipper, although the contract of sale may require him to pay it over to the purchaser. The mortgagee of a ship — that is, a person who has lent money on such security, who has not taken possession — has in general no right to the freight money, unless by a special agreement.

34. No freight money can be earned by an illegal voyage, as the law will not sanction or enforce an illegal contract. Goods are to be delivered by the bill of lading, in good condition, excepting the danger of seas and such other risks as may be mentioned. Yet freight money is payable on goods injured by any of these perils yet actually delivered.

35. A shipper or consignee cannot abandon goods for the purpose of escaping payment of the freight money due on them, though they may be worthless, whenever their changed condition was caused by a sea risk. But if they are actually lost, though not in form, for example, if sugar has washed out of boxes or hogsheads, or wine has leaked out of casks in consequence of injuries arising from the perils of the sea a delivery of the boxes or casks without their contents is not a delivery of the sugar or wine, and consequently no freight money is due. For goods that are injured, or that actually perish, freight money must be paid.

On the other hand, a loss in consequence of the

fault of the owner, the master or crew, must be made good.

36. The rules relating to passage are quite the same as those relating to the payment of freight money. Usually this is paid in advance. But it is not earned except by carrying the passenger, all or a portion of the way. If it is paid in advance and not earned through the fault of the shipper or owner, it can be recovered.

37. The owner may let his ship, and this is done by an instrument called a charter-party. This agreement is of a variable nature depending on the circumstances and pleasure of the parties. Generally, only the right to carry goods is let; in legal phrase, the burden of the ship. The owner holds the possession of her, pays her master and crew and furnishes supplies and makes repairs and navigates her. Sometimes he lets his ship as he might let a house, and then the hirer takes possession, mans, navigates, supplies and even repairs her.

On thus letting a ship, if the hirer takes possession he gives bills of lading to the shippers of goods; if the ship owner retains possession, which is far more common, bills of lading are usually given by him as in the case of a general ship.

38. The charter-party designates the ship and master and parties, also her tonnage, or capacity; also what parts of the ship are let and what parts, if any, are reserved to the owner or to the master. It also describes the voyage or period of time for which the ship is hired, the days for remaining in port, the length of time for discharging the cargo, the obligation to man,

navigate, supply and repair the ship, and all other particulars of the bargain. Finally, it states how much is to be paid for the ship, whether by the ton or otherwise, or a gross sum, for the whole burden, and when the money is payable and how, in what currency or in what exchange, especially if it is to be paid abroad. Nor can the terms of the instrument be varied or changed by external evidence.

39. A hirer who takes the whole vessel pays for the whole, whether he fills her or not. Payment for the empty portion is said to be for dead freight. Either party who is deceived or defrauded by any statement in the charter-party can recover for the injury.

40. The voyage may be double; a voyage out and another in return, or a voyage to one port and then to another. The question sometimes arises whether any freight money is payable if the ship arrives in safety and delivers her cargo there and is lost on her return with the cargo she is then carrying. Of course, the parties may make what bargain they please, but when none is made the tendency of the courts is to consider each voyage at the end of which goods are delivered as a voyage by itself and earning its own freight money.

41. As time has become of the utmost importance in commercial transactions, both parties to the contract should be punctual and cause no unnecessary delay; for this without excuse, the party injured has a remedy against the other. The charter-party usually provides for so many lay-days, or working days, for loading or unloading the vessel. These are counted from her arrival at a wharf or other place of discharge, and not

from her arrival at the port of destination. Sundays are computed in calculating lay-days at the port of discharge, but if the contract specifies working lay-days, Sundays and holidays are excluded.

If more than the agreed lay-days are occupied payment must be made for them, and demurrage means the sum which is thus paid. Usually the charterer agrees to pay a fixed sum as demurrage for each day. If after the lay-days allowed for unloading have begun, but before the cargo is unloaded, the ship and cargo, or cargo alone, without the fault of the owner or master, is lost, the freight money is due, because that was earned as soon as the vessel arrived. If time is occupied in repairing the ship without the fault of the owner or master, the charterer pays during this time, unless the repairs are in consequence of her original unseaworthy character.

42. Many cases have arisen in which the ship was delayed from different causes, giving rise to the question, which party ought to pay for the time thus lost? An eminent writer has said that no delay arising from the elements, as from ice or tides or tempests, or from any act of government, or from any disability of the consignee which could not be imputed to his own act, or to his own wrongful neglect, can give rise to a claim for demurrage. It is essentially due only for the fault or voluntary act of the charterer; but if a vessel is hired by the day, week or month, and is delayed by seizure, capture or other cause, and the impediment is removed and the ship completes her voyage, the charterer pays for the whole time. If she is condemned

or otherwise lost this ends the voyage and the contract.

43. The contract may be dissolved by the parties or against their consent by any circumstance making its fulfilment illegal; for example, by a declaration of war on the part of the country to which the ship belongs against the country to which she was bound.

44. Next may be considered the navigation of the vessel. This is done by the master who is appointed by the part owners or a majority in interest of them. He has the whole care and supreme command of his vessel. He must see to everything relating to her condition, including repairs, supplies, loading and unloading and navigating her. He is principally the agent of the owner; to some extent, however, he is the agent of the shipper, of the insurer, and also of all who are interested in the property under his charge.

45. Much of his authority as agent of the owner springs from necessity. Consequently, if the owner is present, or his agent, or is within easy reach, the master has no power to do many things which otherwise are within his authority.

(*a*) Thus, he can sell a ship only in a case of extreme necessity; in other words, only when it seems impossible to save her, and a sale is the only mode of preserving any part of her value for the owners or insurers. So, too, he can pledge her, but the necessity must be very great, though less than is required to authorise a sale. If money is really needed for the safety of the ship, and cannot be otherwise raised or not without great waste, a pledge can be made.

(*b*) Again, he cannot charter the ship unless a necessity exists. Of course, he can do this if he is clothed with the power; but when he does not possess it the necessity for doing so is simply a mercantile one and no other.

(*c*) Again, to bind the owner for repairs or supplies, there must be a necessity for them, but he is justified in incurring the expense if the condition of the vessel requires them for the safe and comfortable prosecution of the voyage.

(*d*) A master, unlike other agents, may substitute another for himself who possesses all his authority whenever he is unable to discharge all his duties.

(*e*) As the majority of the part owners can appoint the master, so can they remove him. But if he is also a part owner, the right of a majority of the others to remove him has been questioned. Yet the better opinion is, unless he controls one-half or more of the shares of the vessel, he may be removed from his position of master at the will of the majority, even though no cause for removal be assigned.

46. Generally, a master has nothing to do with the cargo beyond receiving and delivering it. But should necessity require, he may sell it, or a portion at an intermediate port, whenever he cannot carry it farther, or without perishing before he can receive specific orders. Again, he may sell it, or a portion, or pledge it to raise money, for the common benefit of the owners of the ship and cargo.

47. An owner is liable for the wrong-doings of the master while he is acting in that capacity. But he is

not liable for his wrongful acts when not thus acting, although at the time holding the office. Thus, if through want of skill or care, he should run down another vessel, the owner would be liable for the collision; but he would not be liable should the master quarrel with a man and beat him on shore, or even on the deck of his vessel; nor would the owner be liable should the master wrongfully take goods on board his ship to derive a profit from them.

The loss of a vessel, though in charge of a part owner, not caused by his negligence or wilful misconduct, falls on all the owners. But when the loss can be traced to the fault of a part owner, every other owner has a right of action against him for the value of his share.

48. The general rule of liability in this country for collisions is, when both parties are equally in fault the loss is apportioned between them. When neither party is at fault the loss rests where it falls. When the fault is wholly on one side the other can recover full compensation.

49. A few principles may be added concerning seamen. The law makes no distinction between officers and mates, as they are usually called, and common sailors. Every master of a vessel is bound to have shipping articles, which every seaman on board must sign, describing the voyage and the terms on which he is to serve. Courts protect seamen against unusual stipulations. If a number of ports are mentioned they are not to be revisited, unless the articles give the master discretion.

50. Seamen have a lien on the ship and on the freight

for their wages. By an ancient rule freight is said to be the mother of wages, and consequently any accident or misfortune whereby a ship cannot earn its freight money destroys the claim of the sailors for wages.

51. Provisions of due quality and quantity must be furnished by the owner, and double wages are given to seamen who are on short allowance, unless the necessity is occasioned by some peril of the sea or other accident of the voyage. The master at any time may put them on a fair and proper allowance to prevent a waste of food.

52. Should they doubt the seaworthiness of the vessel, she may be examined at home or abroad on the complaint of the mate and a majority of the seamen. After shipping, if they refuse to embark on the voyage, because the vessel is not in a fit condition, they may be arrested and a court will inquire into her condition, and on finding the complaint of the seamen justified in some degree, will discharge them, otherwise they will be held guilty.

53. The law also requires that every ship shall have a proper medicine chest; and a monthly deduction is made from the wages of seamen to create a fund for maintaining marine hospitals to which they may go without charge.

54. The right of a seaman to be brought back to the home is guarded by law. A master on his arrival at the home port must account for any absence. If he discharged a seaman abroad with his consent he must pay to the American consul three months' wages.

Two-thirds of this sum is given by the consul to the seaman, and the other third is remitted to the United States Treasury to form a fund for bringing home seamen. Of course, this obligation does not apply to a voyage that has ended by a wreck or similar misfortune.

55. Persons are employed to repair ships and furnish them with supplies. They are called material-men. Such persons and all who work about a vessel, like stevedores, who load and unload, have a lien thereon for their charges. Though by common law material-men have a lien only on foreign ships, in many states by statute they have a lien on all ships, whether domestic or foreign. The lien extends beyond mere repairs to alterations and to rebuilding, but not to the general construction of a vessel. The labourer employed in general work by a shipwright or mechanic has no lien on the vessel for his labour. The liens thus established by statute take precedence of the claims of all other creditors.

One who renders services or furnishes supplies to a vessel and is also a part owner is not thereby deprived of any lien he would have were he not an owner. But he has no priority over other creditors.

56. In general, every part owner is liable for all the repairs of his ship, or for necessaries that are supplied in good faith.

(*a*) A credit given, or intended to be given to a part owner personally, cannot be charged to others. If goods are charged to a ship, or to a ship and owners, this would tend strongly to show that it was the intention

of the person who supplied them to do so on the credit of all the owners. If, on the other hand, they were charged to one owner this would prove that credit was intentionally given to him alone.

(*b*) How far a part owner can bind the others for necessary supplies and repairs is not as well settled as this important question ought to be. Chancellor Kent long ago wrote as the law presumed that the common possession of a valuable thing would lead all to do whatever was necessary to preserve it, part owners had an implied authority from the absent part owners "to order for the common concern whatever is necessary for the preservation and proper employment of the ship." And this view is sustained by the Supreme Court of a state that has often decided questions relating to the law of shipping. "We think it is true, as a general proposition, that a part owner of a vessel, in undisputed possession, will be regarded as having implied authority to bind the other owners for things necessary for the vessel and its employment, unless the evidence discloses something to indicate that such implication of agency is contrary to the fact. As to one who furnished materials to make the vessel seaworthy, upon the order of a part owner in such possession, even if it be in the home port, the presumption remains, unless there is something more than the single fact of the place of registry or enrollment of the owner's residence, to remove it." [1]

(*c*) Again, the person holding the beneficial title to a share in a vessel is liable as part owner. A person,

[1] Bowen v. Peters, 71 Me., 463.

therefore, who is no longer entitled to profits is no longer liable for repairs. But when a transfer of ownership occurs during a voyage the former owner may be liable for repairs pertaining to the ship during that voyage, and also the profits accruing therefrom, unless the transfer provides otherwise. Even then it may be quite beyond the possibility of the parties to change the former's liability to a third person who has contracted or furnished materials by reason of such ownership.

§ 10. Contract of Marine Insurance

1. Nature of the contract.
2. Form of the policy.
3. It is signed only by the insurer.
4. An unnamed party may be insured.
5. Alterations.
6. Policy may be transferred.
7. But insurer must consent.
8. Insured must be interested in the property.
9. What is a valued, and what is an open policy?
10. Valuation is binding on both parties.
11. What may be valued?
12. Valuation of freight and profits.
13. Description of the property insured.
14. Description must identify it.
15. Freight may be covered by overvaluing the ship.
16. Freight may be insured though purchased with proceeds of an illegal voyage.
17. So can freight money.

18. Insurer is only liable for property not covered by prior insurance.
19. What is a warranty?
20. Subjects of warranty.
21. Sailing of the ship.
22. Implied warranties:
    a.— Seaworthiness,
    b.— Standard of seaworthiness,
    c.— Force of policy on unseaworthy ship,
    d.— Duty of master to repair her.
23. Other implied warranties.
24. Misrepresentations and concealments.
25. What facts should be stated.
26. Facts already known need not be.
27. Statements leading to inquiry.
28. False statements.
29. Statements should be fairly construed.
30. When premium is due.
31. Premium is not due unless the risk is incurred.
32. Perils covered by the policy.
33. By perils is meant those incident to navigation.
34. Perils enumerated:
    a.— Collision,
    b.— Fire,
    c.— Barratry.
35. Insurer does not insure against acts of the insured.
36. Damage to the cargo through the ship's fault does not discharge insurer.
37. Generally a loss will not be attributed to the master.

38. Total loss.
39. General average in the case of a partial loss.
40. Essential of a general average.
41. There must be a common peril.
42. How a general average usually arises.

1. The contract of an insurance binds the insurer to indemnify, or make good the insured against loss or injury to the ship, or his interests therein, from specified perils. The consideration for the contract on the part of the insurer is the premium paid to the insured. The contract of insurance is called a policy. No instrument is needful to make such a contract valid; if the proposals of the insured are written in a proposal-book and signed by a proper official with the word "done," or "accepted," or in any way that indicates a bargain, they are valid even without a policy. Indeed, it has been asserted that an oral contract of insurance would be legal.

2. The form of policy in general use is familiar both to the insurer and insured, for it has been in existence many years, both in England and in this country. Of course, changes have been made, but its general features have long been known.

3. It is signed only by the insurer, though binding both parties. It may be made on the application of an agent of the insured whenever he has proper authority for this purpose.

4. A party may be insured who is not named by using the words, "for whom it may concern," or others of a similar character. A person who seeks to have

the benefit of such a policy must show that he had an interest in the ship at the time of insuring her. Another phrase is, "on account of owners at the time of loss." This will cover all the losses of all persons for whom the policy was intended, who then owned the ship, though there may have been transfers between the time of insuring and her injury or destruction.

5. Alterations may be made at any time by consent, but a material alteration by the insured without the consent of the insurer discharges the latter, though made honestly, believing or expecting that he would readily consent. A material mistake of fact in the policy can be corrected by legal proceedings if the parties themselves cannot agree to a proper amendment.

6. A policy may be transferred or assigned, and the assignee may sue, should occasion require, in the name of the assignor. An insurer's assent to the transfer does not always make a contract between him and the assignee in which he can sue in his own name. A loss made payable to order or to bearer is negotiable by indorsement or delivery, but the transferee cannot even then sue in his own name. When the insured transfers the ship with the consent of the insurer, without transferring the policy, the policy is discharged or ended, unless it was expressly made for the benefit of whoever should be the owner at the time of loss.

7. There is usually a clause to the effect that the policy is void if assigned without the insurer's consent; but this does not apply to a transfer effected by law; for example, insolvency or death. And after a loss

has happened the claim against the insurer may be assigned.

8. The contract of insurance is one of indemnity for loss. The insured must therefore be interested in the ship at the time the loss happened. A mere possibility or expectation cannot be insured, but an actual interest in a vessel may be. The owner of goods may insure them, and can recover for their value when they are lost. Also, one who has taken a risk, or agreed to indemnify another, may insure himself against the risk. Again, the lien of one who repairs a house or ship is an insurable interest. And generally any person who has possession of a ship, house or merchandise, or a right to the possession, like a factor, consignee or carrier, may insure his interest. But indebtedness to a creditor for money borrowed that may have been used in buying a ship does not give him the right to insure her.

9. The value or sum to be paid in the event of loss may be fixed by agreement in the beginning and stated in the policy. It is then called a valued policy. Or, the agreement may be that the amount shall be ascertained by proper evidence, and the policy is then called an open policy.

10. This valuation, made in good faith, is binding on both parties, even though it be very high. But a wager policy — in other words, one not founded on value — is void.

11. One thing insured may be valued and not another; or the same thing may be valued in one policy and not in another. If only a part of the goods in-

cluded in the valuation are on board, it applies to them proportionately. A valuation of an outward cargo will generally be taken as a valuation of a return cargo substituted for the other by purchase, and is covered by the same policy.

12. A valuation of freight applies to the whole cargo; and if a part only is risked it applies in proportion. If profits are insured they are generally valued. Very often they are insured by valuing goods high enough to include all the profits.

13. In a policy there is usually added to the description of the ship, "lost or not lost." By this phrase the policy operates in the past, and is effective, even though the ship be not in existence at the time of insuring her.

14. The description must identify the thing insured by quantity, marks, numbers, size, or in some other satisfactory manner. The phrase, "a return cargo," will generally apply to a homeward cargo of the party insured in the same ship, but the word "proceeds" or "returns" is generally regarded as limited to a return cargo, bought by means of the outward one.

15. It is common to cover the freight by an overvaluation of the ship, but an open policy on the ship does not cover the freight. An owner of both ship and cargo may cover by the word freight what his ship would earn by carrying a cargo for another. Insurance on freight from one port to another covers the freight on goods taken by agreement at intermediate ports.

16. A cargo which is lawful may be insured and this may be done, even though it was purchased with the proceeds of an illegal voyage.

17. Freight money,[1] or money that is to be paid for carrying goods, is often insured. An interest in freight money begins as soon as the ship is actually ready for sea, and goods are put on board, or are ready to be thus placed, or are promised to be put on board by a contract that is binding on their owner.

18. Marine policies generally provide that the insurer shall be liable only for that part of the ship or other thing insured not covered by prior insurance. The second policy covers what the first leaves, the third what is left by the second, and so on. Whenever the whole value of the ship is covered by three policies, for example, later ones are of no account. In no event can more than the loss or indemnity be recovered. If all of them take effect at the same time, and afterward the property diminishes in value, then all of them are diminished.

19. A stipulation in a policy that a certain thing shall be, or shall not be, is a warranty; and there must be an exact compliance with it. The excuse is not good that the thing is not material, or not known, or that it was caused by an agent of the insured.[2]

20. The usual subjects of warranty are: first, the

[1] In insurance the term includes the money to be paid to the owner of the ship by the shipper of the goods, and the earnings of an owner by carrying his own goods, for their value is increased by carrying them from one place to another; also the amount to be paid to him by the hirer of his ship and the profits of the hirer either by carrying his own goods, or by carrying for pay the goods of others.

[2] A warranty is legal though written on a separate paper, to which the policy refers.

ownership of the property, which is chiefly important because it secures neutrality or freedom from war risks of the property insured. Again, the neutrality of the ship is sometimes expressly warranted, which is not broken if part of the cargo that is not insured belongs to an enemy. The neutrality of the ship or the cargo must be proved by having on board all the usual and regular documents.

21. Second, is the time of the sailing of the ship. She sails when she weighs anchor or casts off her fastenings and gets under way, even though she stops afterward and is driven back. Even though ready and intending to go, but stops before getting under way, is not a sailing.

22. Besides express warranties, others are implied. (*a*) One of them is seaworthiness. By this is meant that the ship in every respect is able to begin and prosecute the voyage proposed, and encounter safely the common dangers of the sea.

(*b*) There cannot possibly be a definite and universal standard for seaworthiness. A coasting schooner must have one kind of fitness, a freighting ship to Europe another. The same remark applies to the crew, pilot, furniture, also the rigging or sails. In all these respects much depends on usage. Parsons says there is no better test than this: "A ship must have all of these things in such quantity and of such quality as the law requires, providing there is any positive rule of law affecting them; and otherwise such as would be deemed requisite according to the common consent and usage of persons engaged in that trade."

(*c*) As a policy is binding on a seaworthy ship, no violation of it afterward by the insured discharges the insurer from liability for a loss that happened before its violation. Again, even if a policy is not binding at the beginning of the voyage, by quickly remedying the unseaworthiness, the policy binds both parties.

(*d*) When unseaworthy the master must repair her at sea if this be practicable, either with his own means or with the aid of another ship; when this cannot be done he should not keep her at sea if he can readily make a port where she can be made seaworthy. Having entered, his ship should not leave so long as she is in an unseaworthy condition provided she can be made seaworthy there. If leaving sooner, the insurer is no longer liable; but the liability may not be destroyed, but only suspended, if she is made seaworthy at the next port.

23. There are other implied warranties besides seaworthiness. One of them is that the insured shall deal honestly with the insurer, and make a distinct and true statement of all the circumstances affecting the risk. Another is that the ship shall pursue the usual course of her voyage and without deviation.

24. There must be no misrepresentation concerning the character of the ship. Nothing should be concealed, for misrepresentation or concealment discharges the insurer. Many questions have arisen concerning the nature of the representation. Any statement in reply to a distinct inquiry will be deemed material. On the other hand, the insured is not bound

to communicate any mere expectation, or hope, or fear, but only facts material to the risk.

25. Much has been said concerning what things should be made known. Not only should facts be stated by the insured, but also intelligence and rumours, if such matters are important to the risk, and it has been asserted that intelligence known by the clerks of the insured is presumed to have been known by him. If the voyage proposed should violate a foreign law not generally known this should be mentioned. Indeed, everything should be included that might reasonably be considered in estimating the risk. Obviously the season, or political events, or the character of the voyage may make a thing material in a particular venture that would not be in other cases.

26. The insured need not state to the insurer things he already knows, or may be supposed to know; matters are as open to the insured as they are to the insurer. For example, general facts widely published and generally known by all who are interested in shipping. Likewise, things resting on a general rumour known to all alike — facts of science, the position of a port, the peculiar dangers or liabilities of any well-known navigation; the course of winds, currents or weather.

27. Should either party say something to the other that ought to put him on inquiry and none is made, he must bear the consequences.

28. A false statement concerning the terms on which other insurers have taken the risk will vitiate a policy.

And so will a statement that an old ship is new, for her age is an important fact in determining the premium that ought to be demanded. Again, if different policies are on the same vessel and relate to each other, a false statement or misrepresentation to the first insurer is regarded as passing onward and affecting every other.

29. Every statement or representation should be construed fairly so as to include all just and reasonable inferences. A substantial compliance will suffice.

30. The premium is due when the contract of insurance is completed, but in this country the premium is usually paid by a note given on the delivery of the policy, or soon afterward. If the receipt of the premium is acknowledged in the policy this will not prevent an action to get it whenever it has not been paid.

31. Even though the premium is paid, it is not earned unless the risk is incurred, which is not whenever the ship does not sail or had not the goods insured on board. Furthermore, if the premium is not earned in part or in whole, it must be returned, either in whole or in part. But the premium may be partly earned, and then only a part need be returned.

32. Next may be considered the perils covered by policy. An insurer is liable only for extraordinary risks. The very meaning of seaworthiness is that the ship is able to encounter all ordinary perils. If she is lost or injured by an ordinary peril — common weather, for example — the insurer is not liable, because this the ship should be able to withstand. Nor is an insurer

liable for loss or injury by wear and tear, or natural decay, or the effect of age, or hard service. Every part of the ship must, of course, decay, and when she is known to be lost the insurer is not liable without sufficient evidence of an adequate cause. Without this evidence the presumption would be that she was lost by reason of her defectiveness, caused by age and natural wear and tear.

33. By perils are meant those incident to navigation, especially those arising from the wind and weather, the rocks, coast, and the like. But it must be remembered that an insurer does not include everything, only those that are extraordinary. Consequently destruction by worms is not such a peril as renders an insurer liable, because it is not extraordinary. They exist in all waters, and at certain seasons the dangers from this cause are very great. Nor is an insurer liable for an injury caused by rats, for, like worms, they are active and dangerous creatures.

For the same reason an insurer is not liable for the loss of any article whenever it was caused by inherent qualities, unless these became destructive by an insured peril. Thus, hemp rots from fermentation, yet it will not ferment when kept dry, consequently insurers are not liable for a loss arising from dampness at the time of taking hemp on board; but if the vessel were afterward strained by tempest and her seams were opened, wetting the hemp, which afterward rotted, the insurers would be liable.

34. Some of the perils may be briefly mentioned. (*a*) One is collision. (*b*) Fire is another, but it must

be caused by something extraordinary to render the insurers liable. An insurer would also be liable for any direct and immediate consequences of the fire, and for losses caused by the endeavour to extinguish it.

Perhaps the most general rule is that insurers are liable for the loss or injury that is the natural, direct and proximate effect of an insured peril, although the loss might be the immediate effect of a preceding loss. For example, should a part of the cargo be burned, and another part be injured by water used to stop the fire.

(*c*) There are other perils, like piracy, robbery and theft, that need not be described. There is another peril called barratry, which means the wrongful act of the master, officers or crew, against the owner. As the master is appointed by the owner and is controlled by him, many policies provide that they will not insure against barratry, if the insured is the owner of the ship. The purpose of this is obvious. It is to prevent an insurance of the owner against the acts of one who should, or ought to hold himself responsible. As a general rule, insurers are liable for the misconduct of the crew when all reasonable precautions have been taken by the owner and the master to prevent such misconduct.

35. An owner does not insure any man against his own acts. For the negligence or wilful misconduct of the master or crew the insurers may be liable, because in this respect they are not the agents of the owner. They would indeed be his agents if he directed the wrongful act or negligence that destroyed the

property, and in such a case the insurers would be discharged, but we can hardly imagine such a state of things. An owner does not give directions to his servant to be neglectful or to act wrongfully. Consequently, the law assumes that an agent, while wandering from the path of duty, is acting solely on his own account, and not in a representative character.

36. If the cargo is damaged through the fault of the master or crew the shipper has a remedy against the owner of the ship, but this does not discharge the insurers. If, however, the shipper enforces his claim against them he is bound to transfer to them his claim against the ship-owner. For the insurers of the cargo, by paying a loss thereon, put themselves in the position of the shipper and acquire his rights.

37. Generally no loss will be attributed to the negligence or fault of a master or crew that can be attributed to any of the perils mentioned in the policy.

38. A loss may be total. This happens when the whole property passes away; for example, by sinking or destruction by fire. The law also regards a loss as total when the ship or goods are partly destroyed, and permits the insured to abandon whatever is saved to the insurers, and to claim from them the total amount specified in the policy. The abandonment transfers all that remains of the property to the insurers. If nothing remains, or it possesses no value, there need be no abandonment and yet the loss is total.

39. If the goods of several owners are in peril, and

those of one of them are wholly or partly sacrificed for the purpose of saving the remainder, all must contribute toward indemnifying the loser. He is not to be fully indemnified, for then he would be better off than the others, and justice is perfectly satisfied if in the end he suffers like them. This end is attained by a general average. The loss is ascertained and such an assessment is made on the property saved for the benefit of the owners of the property lost as will equalise the loss among all. In this way everyone interested loses an equal proportion of whatever was sacrificed for the common good.

40. The essentials of a general average loss are: First, a common peril impending at the time; second, a voluntary loss or sacrifice of some property for the purpose of saving other property; third, the success of the endeavour.

41. There must be a common peril, for if there be none the loss is merely wasteful. The loss must also be voluntary. There can be no voluntary sacrifice creating a claim for contribution whenever the property destroyed was not merely in danger, but was certain of destruction, because there is no voluntary sacrifice in casting away property that must be inevitably lost. But when the loss of the whole is inevitable, and a part can be saved by destroying the remainder, this is a general average loss for which a contribution should be made.

42. The most common way in which general average arises is by jettison, or the casting overboard of some part of the cargo to save the remainder. If the goods

jettisoned are recovered the loss is then only the expense of recovery and restoration, which must be averaged and paid in such a manner as to fall on all in equal relative proportions.

§ 11. Contract of Fire Insurance

1. Nature of fire insurance.
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3. Methods of fire insurance companies.
4. Execution of a fire policy.
5. Rules for construing.
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25. What value the insurers of goods must pay.
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27. Certificate of loss.
28. Insurers do not pay for losses of profits.

1. Fire is one of the perils covered by marine policies. It is usual, though, to insure buildings and their contents against fire alone. The general purposes and principles of this kind of insurance are the same as those already mentioned, and the law differs only in those ways wherein a difference is necessary by reason of the character of the property insured. This kind of insurance is to indemnify against loss by the burning of ships in port, more often of warehouses and of property stored in them, and still more frequently of goods in stores or factories, or in dwelling-houses or in barns. The most common application of all is to dwelling-houses.

2. Like marine insurance, fire insurance in this country at the present time is effected almost wholly by companies. They are either companies in which persons who own the stock take all the profits as dividends; or mutual companies in which everyone who is insured becomes a member, and the net profits are divided in such a manner as the charter or by-laws of the company may direct. In some cases both forms are united in a single company. In these companies there is a capital stock as a permanent guaranty fund above the premiums received; and a part of the net profits is paid as a dividend

on this fund, while the residue is divided among the insured.

3. The methods of fire insurance companies are quite uniform throughout the country, and any company may appeal to the usage of other companies for answers to various questions. In the first place, there may be an appeal to explain whatever needs explanation, but never to contradict whatever is clearly expressed in the contract. No usage can be admitted even to explain a contract unless the usage is so well established, or so well known, that it may be supposed the parties contracted with reference thereto. And not only must the terms of the contract be duly regarded, but also those of the charter. Thus, if it should provide that all policies and other instruments made and signed by the president, or other officers of the company, shall bind the company, an agreement to cancel a policy should be signed in the same manner.

4. In regard to the execution of a fire policy, there is no material difference between the law concerning fire and marine insurance. An adoption or ratification of a fire or marine policy is the same thing as the making originally of the contract.

5. The rules of construction are generally the same in fire as in marine policies. A policy is sufficient if the words describe the persons, the location and the property sufficiently for the court and jury to determine their identity. In construing this, as well as other contracts, the intention of the parties is the most important guide. The intention, however,

must be that expressed in the contract. Otherwise, a contract that was not made would be substituted for the written one.

To this rule there are some exceptions. Thus, clear and positive evidence of the truth may be shown that a written contract does not express the actual and certain agreement of the parties, by reason of an accidental mistake or omission of words.

6. There is one important difference between the contracts of mutual and stock companies. Every person insured in a mutual company becomes a member. Indeed, the principle on which this insurance rests is that all insure each other. Every person insured, therefore, is bound by all the laws and rules of the company as if they were of his own making. And this is equally true of marine and fire policies.

The mutual fire insurance companies require that an application be made in writing after a peculiar form prescribed by their rules. In each form of application various questions are put, suggested by experience, and are best calculated to elicit all the information needed by insurers for the purpose of estimating accurately the nature of the risk they undertake. To this application, with all the questions and answers, reference is made in the policy, and it becomes a part of the contract.

7. Sometimes there is no application in writing, but the policy itself states the facts relating to the risk. For this purpose it contains many blanks that are filled as each case requires. Should these insertions be inconsistent with what is printed they must

prevail, as they are supposed to express the precise purpose of the parties better than the printed phrases that were prepared without special reference to that particular insurance.

8. It is usual in fire insurance to put in the policy a scale of premiums calculated on different classes of buildings, of stock in trade, or other property in conformity with what is thought to be the greater or less risk of fire in each case. This is regarded as a matter of special importance, and if a statement were made by an applicant which put his building or property into a class on which the risk and premium were less than on the class to which the building or property actually belonged, and in that way an insurance was effected at a less premium, the policy would be void, although the erroneous statement was made innocently.

9. If the printed conditions represent one class of buildings, or companies, or properties as more hazardous than another, the insured cannot prove by other testimony that it was so in fact. Besides, the agreement requires that the property insured shall continue within the class where it is put, or at least that it shall not be entered in another that is more hazardous during the continuance of the policy. A liberal construction, however, has been given to this rule. Thus, it does not apply to a single article, or one or two, kept in a store as a part of the stock of goods, although that article — cotton in bales, for example — is among those specified as hazardous. But if the building is appropriated to a more hazardous occupation than the proposals of the policy indicate,

or if the introduction of these goods materially increase the actual risk, evidence may be received of the intention of the parties to the contract. Thus, on one occasion the storing of wine was prohibited as hazardous, yet it was held that having a pipe or two in the cellar, from which similar vessels in the store were replenished, did not come within the meaning of the word "storing" in the policy, any more than would the keeping of such articles for home consumption in a dwelling-house insured by a similar policy. And if the premises are described as a private residence the insurance is not rendered void by the fact that the occupants moved from the house, leaving it vacant, unless the risk was thereby materially increased.

10. The subject of alteration of property insured is somewhat difficult. Mere alterations, though they may be expensive and important, do not necessarily avoid the insurance, or discharge the insurers. But whenever they have the effect of increasing the risk, or are prohibited in the policy, they become invalid.

Suppose one gets his dwelling-house insured for seven years and describes it correctly as having a shingled roof, but after two or three years the shingles are taken off and slates are used. The risk is not increased nor is the risk of putting on the new covering hazardous, and doubtless in such a case the policy would not be avoided. Suppose a metallic covering is put on that requires soldering; this, surely, is a hazardous operation, and if the building should take fire while making the change the insurance would be

discharged. But after safely finishing the operation there would be no greater hazard from the use of such a roof than from the old one. Again, suppose that while the operation was going on the house was exposed to a greater risk from the outside, and was set on fire by an incendiary, would not the insurer be discharged?

11. An alteration which is permanent and causes a material increase of the dangers of fire is a violation of the contract and discharges the insurers. Not only so, but as soon as the preparations for it are begun — for example, the erection of scaffolding to do the work, or any other preparation materially affecting the risk — the insurers are discharged.

12. The insured has a right to keep his building in good repair; indeed, it is his duty, as well as the interest of the insurer that he should do so, for any condition of disrepair would tend more or less strongly to increase the risk of fire. The insured, therefore, may repair without obtaining leave to do so, and the insurer is always liable, although the fire takes place while the repairs are in progress. It may be added that the fire policies most frequently in use give the insured the right of keeping the property in repair.

13. With respect to the sufficiency of the interest of the insured to support an insurance, the same principle applies as in marine insurance. A legal interest is sufficient. One who has made only an oral bargain with another to purchase his house cannot insure it; but if he made a written contract the purchaser may insure. Again, a debtor, who assigns his property to pay his debts, has an insurable interest

therein unless the property is sold.[1] A mortgagor also may insure the whole value of his property, even after transfer of possession to the mortgagee, provided his right to recover the same is not wholly gone. Again, both a mortgagor and a mortgagee may insure the same property, and only one of them need specify his interest.

14. A trustee's agent or consignee may insure against fire, as he may against a marine loss. Generally a consignee is not bound to insure against fire, but may do so at his discretion. The agent of goods held on commission may insure expressly his own interest in them for advances, or he may insure only the owner's interest. When the interest is not expressed the policy will be regarded as not covering the interest of the owners if, on a fair construction of the words and facts, it seems to have been the intention of the party to secure only the consignee's interest. It is now a common thing for a commission merchant to cover in one policy in his own name all the goods of the various owners that have been consigned to him. "Goods held on commission" in fire policies have the same effect as the words, "for whom it may concern" in marine policies. A consignee of goods may insure his own interest in them against marine or fire risks. So, any bailee, or person in possession of goods, although for a short time, may insure them against the fire. Thus, a common carrier by land, who has a lien on goods and is answerable for their loss by fire, may insure them for their full value.

[1] See § 17 of this section.

15. Insurers must know the insured. Not infrequently companies decline to insure persons, because they are so neglectful in caring for their property, and perhaps are suspected of destroying it wilfully.

16. The law of warranty and representation is the same in fire as in marine insurance. A warranty is a part of the contract and must be distinctly expressed and written either on the policy, or on a paper attached to the same, forming an essential part. The warranty may be of a present or future character. The warranty may also be a continuing one, rendering the policy void by the non-continuing of the thing that is warranted to exist. Whether it is continuing or not must evidently be determined by the nature of the thing warranted. A warranty that the roof of a house is slate, or that there are only so many fireplaces, or stoves, would generally be regarded as continuing; but a warranty that a building was five hundred feet from any other would not render the policy invalid if a neighbour should erect a house within one hundred feet without any knowledge of the insured.

17. Statements may be made on a separate paper; in such cases it is usual to refer to them in the policy in such a manner that both shall form one instrument.

18. The word warranty need not be used if the language clearly imports, or means the same thing, and an indorsement on a policy before its execution may take effect as a part of it.

19. In a policy may be made a statement which is not to be regarded as a warranty by the insured, but merely as a license or permission of the insurers

that the premises may be kept in a certain way; for example, the statement that a dwelling-house "is to be hereafter occupied as a tavern."

20. A representation differs from a warranty in this respect, that it is not a part of the contract. Of course, when made after the signing of the policy, or the completion of the contract for insurance, the contract is not affected. When made before the contract and for the purpose of effecting insurance, a false and material representation, though forming no part of the contract, avoids the policy. The true answer to a question of this kind is whether or not the contract would have been made, and in the same terms if the statement had not been made to the insurers. If the answer is that they would have declined to make such a contract, then the statement is material, otherwise it is not.

21. Concealment is the opposite of representation. The insured is bound to state all that he knows himself, and all that the insurer ought to know for the purpose of estimating correctly the risk assumed. A suppression of the truth has the same effect as expressing what is false. Insurers must be understood as knowing all those matters of common information that are as much within their reach as that of the insured; these therefore need not be especially stated. But special circumstances, for example, that many fires had taken place in the neighbourhood, and the probability or belief that incendiaries were at work, should be made known; and any questions asked must be answered as fully and precisely as they require.

Concealment in an answer to a specific question can rarely be justified by showing that it was not material.

22. At the time of insuring the property must be in existence and not on fire, nor exposed to a dangerous fire in the immediate neighbourhood, because the insurer assumes that no unusual risk exists at that time. Insurers are not liable if the property be destroyed or injured by the indirect effect of excessive heating, or by any effect which stops short of fire or combustion. But if there be an actual ignition, or lighting, they are liable for the immediate consequence; for example, for the injury from water used to extinguish a fire. In some instances policies require that the insured shall use all possible diligence to preserve his goods; such a clause would strengthen his claim for insurance, should they be destroyed after making an effort to save them by removal. So the insurers are liable for the injury or loss sustained by the blowing up of buildings to arrest the progress of fire. As lightning is not fire, if property be destroyed thereby, the insurers are not liable unless there was ignition. An explosion caused by gunpowder is a loss by fire, but not an explosion caused by steam. In science it might be difficult to distinguish between these two causes, but the law makes distinctions of its own.

23. Whether, when the negligence of the insured or his servant is regarded as the sole or direct cause of the fire or loss, the insurers can be held, has been already considered. A loss caused by the negligence of the insured himself, so extreme and gross as to strongly indicate the conclusion that he was guilty of

fraud, would be an effective defense. A fire caused by the insanity of the insured would be no defense.

24. Mutual companies are usually forbidden by their charters to insure more than a certain proportion of the value of a building. Of course, the insured can never be held to pay more than the sum mentioned in the policy. But the charter or by-laws permits a company to insure only a certain proportion of the value, three-fourths, for example, and if more than that sum is insured, it is not required to pay more than the three-fourths; and the person insured cannot show that the building was really worth more than the additional one-fourth. On the other hand, the valuation, if honestly made, is binding on the insurer and he cannot prove that the building is worth less. Sometimes a policy reserves to the insurers the right to have a new valuation made in the event of loss. In such a case, if a lower valuation is made, the insurers are required to pay only the same proportion of the new valuation which they had insured of the former valuation.

25. The sum that insurers of goods must pay is their value at the time of the loss; and a fair sale at auction is generally taken as a correct valuation, provided the insurers had reasonable notice or knowledge that the auction was to take place.

26. Policies against fire are personal contracts and do not pass to any other party without the consent of the insurers. Of course, assignments are made with the consent of the insured. In all cases the rules or usages of the insurers in this respect must be regarded.

27. When a policy requires a certificate of the loss this must be presented to obtain the insurance money. If the policy requires notice to be given forthwith there must be no unreasonable or unnecessary delay. In fire policies, as the premises are supposed to be always open to the inspection of the agents of the insurers, a general notice of fire will probably suffice. Of course, the insurers may waive their right of notice wholly or partly, and they may do this expressly, or by any acts fairly indicating to the insured that they accept an imperfect notice given to them, or that they have taken the matter into their own hands and have made inquiries and obtained all the information desired. And a refusal to settle the claim in any way has been regarded as a good excuse for not giving a notice.

28. Insurers against fire are not held to pay for losses of profits, gains of business or other remote consequences. Most of the fire policies used in this country give the insurers the right to rebuild or repair premises injured by fire instead of paying the amount of the loss. If, under this power, insurers rebuild a house, for example, that has been insured, at less cost than the amount specified in the policy, they are nevertheless the insurers of the new building for the difference between the cost and the amount they had insured during the unexpired period covered by the policy. And if repairs are made by the insurers they must be begun within a reasonable time, which is a question of fact to be determined in the same manner as every other whenever the parties are unable to answer it themselves.

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